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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

VS.

UNITED STATES REALTY AND IMPROVEMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1940
CERTIORARI GRANTED APRIL 1, 1940

United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor,

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellee.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellant,

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

In Proceedings
For an
Arrangement
Under Chapter XI
of the Bankruptcy Act

TRANSCRIPT OF RECORD.

UPON APPEAL FROM THREE ORDERS DATED JULY 28,
1939 OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK



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United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor,

In Proceedings

For an

Arrangement

Under Chapter XI
of the Bankruptcy Act

1

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellee.

Consolidated Record
on Appeal

2

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellant,

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

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Statement Under Rule 13.

On May 31, 1939, the Debtor filed with the United States
District Court for the Southern District of New York a

Statement Under Rule 13.

petition under Chapter XI of the Bankruptcy Act proposing an Arrangement. By an order dated May 31, 1939 and made by Judge Vincent L. Leibell, the said District Court found that the petition had been properly filed under Section 322 of Chapter XI and continued the Debtor in possession.

A meeting of creditors pursuant to Chapter XI was held before Judge Vincent L. Leibell on June 28, 1939, was continued on July 7, 1939, and was closed on July 10, 1939. Hearings before Judge Vincent L. Leibell were held on July 20, 1939, July 27, 1939, and July 28, 1939.

The Debtor filed an application for confirmation of the Arrangement on July 7, 1939.

In a memorandum dated July 5, 1939, served on all the parties at the direction of Judge Vincent L. Leibell, submitted on July 7, 1939, and thereafter filed on July 28, 1939, the Securities and Exchange Commission notified the parties that it had obtained leave of the Court to appear in the proceeding as amicus curiae, to present its views therein as set forth in an "Outline of Matters to be Discussed by the Securities and Exchange Commission", attached to said memorandum, the conclusions therein being:

(a) that the order of the Court dated May 31, 1939, finding that the Debtor's petition was properly filed under Chapter XI of the Bankruptcy Act, should be vacated;

(b) that confirmation of the Debtor's proposed Arrangement should be denied as not for the best interests of creditors; as not fair and equitable, or feasible; and as not proposed in good faith; and

(c) that the petition and the proceeding should be dismissed.

Statement Under Rule 13.

By order to show cause dated July 18, 1939, there was brought on for hearing on July 20, 1939, a motion of the Securities and Exchange Commission for leave to intervene in the proceeding for the purpose of moving the Court (a) to dismiss the Debtor's petition for an Arrangement, (b) to deny confirmation of the Debtor's Arrangement, and (c) to dismiss the proceeding instituted by the Debtor under Chapter XI of the Bankruptcy Act. Judge Vincent L. Leibell granted the motion for intervention by an order made and entered on July 28, 1939.

By order to show cause dated July 18, 1939, there was brought on for hearing on July 20, 1939, motions of the Securities and Exchange Commission (a) to vacate the order of May 31, 1939, finding the Debtor's petition to have been properly filed under Section 322 of Chapter XI, (b) to dismiss the Debtor's petition, (c) to deny confirmation of the Debtor's proposed Arrangement, and (d) to dismiss the proceeding under Chapter XI. Judge Vincent L. Leibell denied these motions in all respects by an order made and entered on July 28, 1939.

On July 28, 1939, over objection by the Securities and Exchange Commission, Judge Vincent L. Leibell made an order referring the proceeding to Hon. John E. Joyce, a Referee in Bankruptcy. At the time of the taking of these appeals, there had been no proceedings before the said Referee but all of the proceedings had been before the Judge.

On August 3, 1939, the Securities and Exchange Commission filed its notice of appeal from the following orders:

1. Order of July 28, 1939 denying the motions of the Securities and Exchange Commission (a) to vacate the order of May 31, 1939, (b) to dismiss the Debtor's petition, (c)

Statement Under Rule 13.

to deny confirmation of the Debtor's proposed Arrangement, and (d) to dismiss the proceeding under Chapter XI; and

10 2. Order of July 28, 1939 referring the proceeding to a Referee in Bankruptcy.

On August 8, 1939, the Debtor filed a notice of appeal from the order of July 28, 1939 granting the motion of the Securities and Exchange Commission for leave to intervene in the proceeding.

By stipulation dated September 6, 1939 and the order thereon made by Circuit Judge Augustus N. Hand, filed September 16, 1939, the records on appeal were consolidated.

White and Case, Esqs., appeared as attorneys for the United States Realty and Improvement Company, the Debtor.

11 Edmund Burke, Jr. and J. Anthony Panuch, Esqs., appeared as attorneys for the Securities and Exchange Commission, Intervenor.

Davis, Polk, Wardwell, Gardiner and Reed, Esqs., appeared as attorneys for the Guaranty Trust Company of New York, as Mortgagee under First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 of Trinity Buildings Corporation of New York.

12 Simpson, Thacher and Bartlett, Esqs., appeared as attorneys for James A. Beha, Peter E. Bennett, Lloyd E. Lubetkin and Eugene W. Potter, as Trinity Buildings Corporation (111-115 Broadway) Bondholders' Committee, Intervenor.

Ralph Montgomery Arkush, Esq., appeared as attorney for Peter Grimm, Charles F. Simmons, Erwin Stugard, Leonard A. Wales and Guy Wheeler, as Trinity Buildings Corporation of New York Mortgage Certificateholders Committee, Intervenor.

Statement Under Rule 13.

William E. Bardusch, Esq., appeared as attorney for Ralph W. Earl and Donald M. Halsted, on behalf of Holders of Share Certificates in First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 of Trinity Buildings Corporation of New York, Intervenor.

**Debtor's Petition for Arrangement,
Filed May 31, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor.

In Proceedings
for an
Arrangement.
No. 74023

*To the Honorable the Judges of the United States District
Court for the Southern District of New York:*

The petition of the United States Realty and Improvement Company (hereinafter referred to as the "Debtor") respectfully states:

1. The Debtor is a corporation duly organized and existing under the laws of the State of New Jersey and has had its principal place of business at 111 Broadway, New York, N. Y., within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition, than in any other judicial district, to wit, the Debtor has maintained such principal place of business for in excess of ten years. The Debtor was incorporated on May 26, 1904.

2. The Debtor is a person who could become a bankrupt under Section 4 of the Bankruptcy Act and is not a muni-

Debtor's Petition for Arrangement.

cial, railroad, insurance or banking corporation or a building and loan association.

3. The nature of the business conducted by the Debtor is the management and ownership of investments in real estate. No bankruptcy proceeding, initiated by a petition for or against the Debtor, is now pending.

4. The Debtor owns all of the capital stock of Trinity Buildings Corporation of New York, which is indebted to the Debtor as of December 31, 1938 in the amount of \$10,442,482.99. Trinity Buildings Corporation of New York on June 1, 1919 issued its First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, for \$7,000,000, executing and delivering to Guaranty Trust Company of New York, as Mortgagee, its Bond and First Mortgage to secure the same. Share Certificates therein were issued by Guaranty Trust Company of New York and sold to the Debtor which in turn executed a Guarantee thereof and sold such certificates to The National City Company, which in turn sold them to the public.

5. The Debtor on June 1, 1919 guaranteed as aforesaid the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its First Mortgage Twenty-Year Five and ~~One-Half Per Cent~~ Sinking Fund Gold Loan dated June 1, 1919 and due June 1, 1939, and the sharecertificates issued therein. A copy of such Mortgage and Guarantee is annexed hereto as Exhibit A.

6. The principal amount of such Loan and sharecertificates presently outstanding is \$3,710,500, the remainder having been retired by operation of the sinking fund. Such

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Debtor's Petition for Arrangement.

Loan matures on June 1, 1939. Trinity Buildings Corporation of New York will be unable to make payment thereon and the Debtor will be unable to meet its Guarantee thereof and is therefore unable to meet its debts as they mature. All interest on the certificates has been paid to December 1, 1938 and real estate taxes on the premises have been paid to date. However, under the provisions of the Bond and First Mortgage and of the Mortgage Moratorium Law of the State of New York, sinking fund payments of principal have been postponed in amounts aggregating \$597,144.32 as of December 31, 1938.

7. The Debtor proposes herewith an Arrangement under Chapter XI, Section 322 of the Bankruptcy Act, which is contained in Exhibit B annexed hereto and hereby made a part hereof, entitled "Amended Modification Plan and Arrangement of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, and Guarantee thereof" dated May 1, 1939 (hereinafter referred to as the "Arrangement"), which provides for the modification and alteration of the rights of one class of unsecured creditors, namely, holders of the aforesaid sharecertificates.

8. Such Guarantee constitutes a debt within the definition of Section 307(2) of the Bankruptcy Act and holders of the aforesaid sharecertificates constitute creditors within the definition of Section 307(1) of the Bankruptcy Act.

9. No other creditors or class of creditors are affected by the Arrangement because the Debtor proposes to and is able to pay all of its debts, secured and unsecured, as they mature. All other funded debt of the Debtor is secured and the only

Debtor's Petition for Arrangement.

other unsecured debt besides the aforesaid Guarantee is set forth in the schedules annexed hereto and is the result of current operations of the Debtor, and the Debtor proposed to pay such debts, secured and unsecured, as they mature.

25

10. On or about March 15, 1939 the Debtor mailed or caused to be mailed to all known holders of sharecertificates, a copy of a Modification Plan and Arrangement, dated March 15, 1939. Thereafter certain holders of sharecertificates, without solicitation on the part of the Debtor or Trinity Buildings Corporation of New York, proposed certain amendments to such Modification Plan and Arrangement, which were adopted by the Debtor and are reflected in the Arrangement proposed herewith and entitled "Amended Modification Plan and Arrangement", dated May 1, 1939; such Arrangement has been mailed to all known holders of sharecertificates along with the form of proof of claim and acceptance annexed hereto as Exhibit C. The holders of sharecertificates which proposed such amendments are financial institutions which, for the most part, made independent investigations of the Debtor, of Trinity Buildings Corporation of New York, and of the mortgaged premises, and, for the most part, have executed acceptances thereto. In the aggregate, proofs of claims and acceptances in writing of the Arrangement have been received from holders of sharecertificates representing \$1,357,000 in amount of outstanding sharecertificates.

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11. There are presently outstanding \$3,710,500 principal amount of sharecertificates; with the exception of \$136,500 principal amount all are bearer certificates. The Debtor and Guaranty Trust Company of New York, as Mortgagee, have diligently endeavored to ascertain the number of holders

Debtor's Petition for Arrangement.

of bearer sharecertificates. Upon information and belief and based upon such investigation and information tax returns, the aggregate number of holders of sharecertificates, both bearer and registered, is 899.

12. Guaranty Trust Company of New York, as Mortgagee, is merely Trustee for holders of sharecertificates entitled to rights under the Guarantee. The Debtor is advised by counsel, believes and therefore alleges that in computing the number and amount of acceptances and the number and amount of proofs of claim filed with respect to the Guarantee, any proof of claim filed by Guaranty Trust Company of New York, as Mortgagee, on behalf of all creditors entitled to rights under the Guarantee, be not considered for the purposes of the Arrangement and its acceptance but only for the purposes of distribution under the Arrangement.

13. The schedule hereto annexed marked Exhibit D and verified by the Executive Vice-President of the Debtor contains a full and true statement of all of its debts, and so far as it is possible to ascertain, the names and places of residence of its creditors and such further statements concerning said debts as are required by the Bankruptcy Act.

14. The schedule hereto annexed marked Exhibit E and verified by the Executive Vice-President of the Debtor contains an accurate inventory of all of its property, real and personal, and such further statements concerning said property as are required by the provisions of the Bankruptcy Act.

15. The statement hereto annexed marked Exhibit F and verified by the Executive Vice-President of the Debtor contains a full and true statement of all of its executory con-

Debtor's Petition for Arrangement.

tracts as required by the provisions of the Bankruptcy Act. The Arrangement provides that none of the executory contracts of the Debtor are to be affected under or by it and none are to be rejected in these proceedings.

31

16. The statement hereto annexed marked Exhibit G and verified by the Executive Vice-President of the Debtor contains a full and true statement of its affairs as required by the provisions of the Bankruptcy Act.

17. The Arrangement which has already been accepted in writing by a substantial number of creditors accepting thereby provides inter alia as follows:

"(1) The sole creditors of Realty to be affected by the Arrangement will be holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee. All other creditors of Realty are not to be affected by the Arrangement. Therefore, creditors of Realty for the purposes of the Arrangement and its acceptance are divided into classes as follows:

22

(i) Holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee;

(ii) All other creditors.

33

(2) The acceptance is also to constitute a proof of claim in the Arrangement proceedings. Proofs of claim are not to be filed by any other creditors since no other creditors will be affected by the Arrangement. Such acceptances are to be delivered by holders of certificates

Debtor's Petition for Arrangement.

to Trinity for filing in Court at or before the first meeting of creditors.

(3) There is not to be any deposit of the consideration to be distributed to creditors or money to pay debts which have priority, since all debts, with the exception of the liability under the Guarantee, are to be paid as they become due, including debts incurred prior to the institution of the Chapter XI proceeding and debts incurred during the pendency thereof.

(4) No trustee or receiver is to be appointed and Realty is to remain in possession and control of its assets as debtor in possession. Realty is to continue its operations, meeting its obligations as they become due and paying its officers and other expenses as if no Chapter XI proceeding were pending.

(5) No appraiser or appraisers are to be appointed by the Court to prepare any inventory or appraisal of the property of Realty.

(6) None of the executory contracts of Realty are to be affected under or by the Arrangement since none are to be rejected thereunder.

(7) The Court will retain jurisdiction of Realty in the Chapter XI proceeding at least until (i) the consummation of the Arrangement (which is entirely independent of the institution or consummation of the plan of Reorganization for Trinity under the Burchill Act); or (ii) confirmation of the Plan under the Burchill Act for Trinity; whichever is sooner.

Debtor's Petition for Arrangement.

(8) Realty may apply to the Court in the Chapter XI proceeding for an injunction and stay until final decree of the commencement or continuation of suits or other proceedings against it with respect to the Guarantee in order that no litigation interfere with the progress of the Arrangement.

37

(9) The institution, confirmation or consummation of the Arrangement shall not (i) constitute a waiver or release of any and all rights and defenses which Realty is presently entitled to under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the maturity of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates."

35

18. Since the sole creditors to be affected by the Arrangement will be those entitled to rights under the Guarantee, the Debtor proposes that the Court for the purposes of the Arrangement and its acceptance, fix the division of creditors into classes as follows:

- (i) Creditors entitled to rights under the Guarantee, and
- (ii) All other creditors (not affected by the Arrangement).

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19. The business of the Debtor consisting merely of management and ownership of investments in real estate, it is believed that no trustee or receiver of its assets should be appointed, because no purpose would be served thereby, and the expenses of this proceeding would be materially in-

Debtor's Petition for Arrangement.

40 creased, and it might permit creditors not affected by the Arrangement to accelerate the maturity of their indebtedness. The Debtor proposes to continue its operations, meeting its obligations as they mature, with the exception of the obligation under the Guarantee which the Debtor proposes to meet or cause to be met in accordance with the terms of the same as modified by the Arrangement. The Debtor proposes to continue to pay its officers and directors in the same manner as it has in the past as evidenced by a schedule of such salaries and fees contained in Exhibit H annexed hereto and hereby made a part hereof.

41 20. Since only creditors entitled to rights under the Guarantee are to be affected by the Arrangement, the Debtor proposes that a stay and injunctive relief be granted only with respect to suits or actions or legal proceedings concerning the Guarantee, and that any other suits or actions or legal proceedings be not stayed or enjoined.

21. The Debtor proposes that it be exempted from the provisions of Rule XI-8 for two months from the date of this Petition, and that a report and summary of the operations of its business be filed at the termination of these proceedings, or if not terminated at such time, no later than the 1st day of August, and monthly thereafter.

42 22. Annexed hereto as Exhibit H is an affidavit required by Rule XI-2 of the Court.

23. Annexed hereto as Exhibit I is a form of notice which the Debtor proposes to send to all known creditors and to publish once in such newspaper as the Court may determine, within three days of the entry of this order.

Debtor's Petition for Arrangement.

WHEREFORE, the Debtor respectfully prays that the Court make an Order approving the Petition for an Arrangement etc. substantially in the form submitted herewith.

43

UNITED STATES REALTY
AND IMPROVEMENT COMPANY

By Edwin J. Beinecke
President

ATTEST:

Frederick M. Sanders
Secretary

Corporate seal

44

[Verification]

45

Debtor's Petition for Arrangement.

6

Exhibit A.**BOND, MORTGAGE AND GUARANTEE**

46

[as abridged by stipulation dated September 13, 1939]

* * * * *

The Bond of Trinity Buildings Corporation of New York.**TRINITY BUILDINGS CORPORATION
OF NEW YORK.****First Mortgage Twenty Year Five and One-half
Per Cent. Sinking Fund Gold Loan.**

47

Know All Men by These Presents:

That Trinity Buildings Corporation of New York, a corporation duly organized and existing under the laws of the State of New York, hereinafter termed the "Corporation", does hereby acknowledge itself to be indebted to Guaranty Trust Company of New York, a trust company duly organized and existing under the laws of the State of New York, hereinafter termed the "Trust Company", in the sum of Seven Million Dollars (\$7,000,000), which sum said Corporation does hereby covenant to pay to said Trust Company, its successors and assigns, at the principal office of said Trust Company in the Borough of Manhattan, City of New York, on the first day of June, 1939, in gold coin of the United States, of the standard of weight and fineness of June 1st, 1919, with interest thereon, to be computed from the first day of June, 1919, at the rate of five and one-half per centum (5½%) per annum, and to be paid in like gold coin, semi-

48

Debtor's Petition for Arrangement: Exhibit A.

annually on the first day of December next ensuing the date hereof, and semi-annually thereafter.

AND THE CORPORATION DOES HEREBY FURTHER COVENANT that it will pay the aforesaid principal sum, and the interest thereon, without deduction for any tax, assessment or governmental charge (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of such interest) which the Corporation or the Trust Company may be required or authorized to pay thereon or to retain therefrom under any present or future law of the United States of America, or of any State, County, municipality or other taxing authority therein; and that it, the said Corporation, will pay in behalf of any holder or owner of any share in this bond and in the mortgage given to secure the same any Federal income tax to the extent of, but not exceeding, two per cent. (2%) of such interest which the Corporation or the Trust Company may lawfully pay at the source.

AND IT IS HEREBY EXPRESSLY AGREED that the whole of the said principal sum shall become due at the option of the Trust Company after default for sixty days in the payment of any interest hereon, or after default for sixty days in any payment into the Sinking Fund provided for in the mortgage given to secure this bond, or after default for ninety days after notice and demand in the payment of any tax, assessment or water rates upon the premises described in said mortgage, or after any other default, or upon the happening of any event by which, in any case, under the terms of said mortgage, the said principal sum may or shall become due and payable.

AND IT IS FURTHER EXPRESSLY AGREED that all of the covenants made by the Corporation in its mortgage

Debtor's Petition for Arrangement: Exhibit A.

bearing even date herewith, made and executed to Guaranty Trust Company of New York, to secure this bond, and collateral hereto, upon the premises therein described, known as the Trinity Building, at No. 111 Broadway, and the United States Realty Building, at No. 115 Broadway, both in the Borough of Manhattan, City of New York, are hereby made part of this instrument.

IN WITNESS WHEREOF, the Corporation, in pursuance of due authority, and of all and every legal right and power in it vested, has caused these presents to be executed and its corporate seal to be hereunto affixed and duly attested, by its proper officers thereunto duly authorized, as of the first day of June, one thousand nine hundred and nineteen.

TRINITY BUILDINGS CORPORATION
OF NEW YORK,
By A. C. Mau,
President.

(Corporate Seal)

Attest:

A. J. Flohr,
Secretary.

[Acknowledgment]

Debtor's Petition for Arrangement: Exhibit A.

.

The Mortgage executed by Trinity Buildings Corporation of New York covering The Trinity and United States Realty Buildings to secure its bond.

55

THIS MORTGAGE, dated the first day of June, one thousand nine hundred and nineteen, between Trinity Buildings Corporation of New York, a corporation duly organized and existing under the laws of the State of New York, hereinafter termed the "Mortgagor", and Guaranty Trust Company of New York, a trust company duly organized and existing under the laws of the State of New York, hereinafter termed the "Mortgagee", whose principal place of business is at No. 140 Broadway, in the Borough of Manhattan of the City of New York;

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WITNESSETH: That to secure the payment of an indebtedness in the sum of Seven Million Dollars (\$7,000,000) to be paid to the Mortgagee at its principal office in the Borough of Manhattan of the City of New York, on the first day of June, 1939, in gold coin of the United States, of the standard of weight and fineness of June 1, 1919, with interest thereon to be computed from the first day of June, 1919, at the rate of five and one-half per centum ($5\frac{1}{2}\%$) per annum, and to be paid in like gold coin, semi-annually, on the first day of December next ensuing the date hereof, and semi-annually thereafter, according to a certain bond or obligation for the said principal sum and interest executed and delivered by the Mortgagor to the Mortgagee and bearing even date herewith; and also for and in consideration of one dollar, paid by the Mortgagee, the receipt whereof is hereby acknowledged.

57

The Mortgagor does hereby grant, release and mortgage unto the Mortgagee, and its successors and assigns forever,

.

Debtor's Petition for Arrangement: Exhibit A.

TO HAVE AND TO HOLD the above granted premises into the Mortgagee, its successors and assigns forever.

PROVIDED, ALWAYS, that until the happening of a default under the terms of said bond or of this mortgage, and the continuance of such default for a period, if any, therein or herein specified, the Mortgagor shall be suffered and permitted to retain actual possession of the said mortgaged premises, and to manage, operate and use the same, and to collect, receive, use and enjoy the earnings, income, rents, issues and profits thereof; and

PROVIDED, FURTHER, that if the Mortgagor shall well and truly pay, or cause to be paid, the principal sum of the indebtedness mentioned in said bond, and the interest thereon, at the time and in the manner therein and herein provided, and shall also pay, or cause to be paid, all other sums payable hereunder by the Mortgagor, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of these presents, then and in that case these presents and the estate, rights, title and interest hereby granted, shall cease, determine and become void; otherwise these presents shall continue and remain in full force and virtue.

And the Mortgagor, for itself, its successors and assigns, does hereby covenant and agree to and with the Mortgagee, for the benefit of the Mortgagee, its successors and assigns, and the holders or registered owners for the time being of any certificates representing shares in said bond and this mortgage (hereinafter referred to as the "certificates") which the Mortgagee may issue and reissue from time to time, as follows:

1. That the Mortgagor will and punctually pay or cause to be paid the principal sum of the aforesaid bond.

Debtor's Petition for Arrangement: Exhibit A.

and the interest thereon, at the times and in the manner therein and herein provided; without deduction from such principal or interest for any tax, assessment or governmental charge (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of such interest), which the Mortgagor or the Mortgagee may be required or authorized to pay thereon or to retain therefrom under any present or future law of the United States of America, or of any State, county, municipality or other taxing authority therein; and that it, the said Mortgagor, will pay in behalf of any holder or owner of any share in said bond and this mortgage any Federal income tax to the extent of, but not exceeding, two per cent. (2%) of such interest, which the Mortgagor or the Mortgagee may lawfully pay at the source.

2- That the Mortgagor from time to time will pay and discharge all taxes, assessments, water rates and other charges which may be assessed or become liens on the mortgaged premises, and all taxes, assessments and other charges (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of the interest) which may be assessed or become liens on the lien or interest of the Mortgagee therein, so that the lien and priority of this mortgage shall be fully preserved at the cost of the Mortgagor, without expense to the Mortgagee or the holders or registered owners of the certificates; and, whenever called upon to do so, the Mortgagor will furnish to the Mortgagee satisfactory proofs of the payment of any such taxes, assessments, water rates or other charges, and, in default of the payment of any thereof when the same shall become due and payable, the Mortgagee in its discretion, without notice to or demand on the Mortgagor, may pay the same, and any amount so paid shall be

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Debtor's Petition for Arrangement: Exhibit A.

repaid by the Mortgagee to the Mortgagor with interest thereon, without notice or demand, and until such repayment, the same shall be a lien on the mortgaged premises and shall be secured by the said bond and this mortgage.

* * * * *

11. That to provide a Sinking Fund for the reduction from time to time of the indebtedness hereby secured by the purchase and retirement or redemption of said certificates issued and to be issued by the Mortgagee, the Mortgagor will pay to Guaranty Trust Company of New York, or its successors, in the capacity of Sinking Fund Trustee, the quarterly sum of fifty thousand dollars (\$50,000), in gold coin of the United States of the standard of weight and fineness existing June 1, 1919 (subject to increase or reduction of any such quarterly payment as hereinafter provided), within thirty (30) days after the expiration of each quarterly period ending respectively August 31st, November 30th, February 28th and May 31st, in each year, provided, however, that for any quarter in which the "residual net profits", as hereinafter defined, are less than fifty thousand dollars (\$50,000), the Mortgagor may postpone such part of the quarterly payment to the Sinking Fund as shall not be in excess of one-half of the difference between fifty thousand dollars (\$50,000) and such "residual net profits", and provided, further, that the amount so postponed in any quarter shall not exceed twenty-five thousand dollars (\$25,000), so that not less than the sum of twenty-five thousand dollars (\$25,000) shall be paid into the Sinking Fund for any such quarter, and provided, further, that any amounts so postponed from time to time shall accumulate as arrears and shall be added to the quarterly payments successively becoming due, until all such arrears are fully paid, and provided, fur-

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ther, that for any quarter or successive quarters in which the "residual net profits" are in excess of fifty thousand dollars (\$50,000) the Mortgagor shall pay into the Sinking Fund, in addition to the regular quarterly payment or payments of fifty thousand dollars (\$50,000), an amount equal to one-half of the balance of such "residual net profits" remaining after the payment of said regular quarterly payment, or so much of said amount as shall be necessary to liquidate said arrears in full.

The fact that in any given quarter the said "residual net profits" are less than fifty thousand dollars (\$50,000) shall be established only by a report of public accountants satisfactory to the said Sinking Fund Trustee, which shall be filed with the said Sinking Fund Trustee within the said period of thirty (30) days after the end of any such quarter. Said report shall show the gross income derived or accruing from the operation of the mortgaged premises during such quarter and shall show as offsets only the following charges and no others, to wit: (1) the actual current operating expenses, including repairs, maintenance and a fair proportionate part of the cost of alterations for tenants, but excluding depreciation, commissions on rentals, charges for general management and salaries of executive officers, except a fair salary to the superintendent or general manager, (2) a proportionate part of the real estate taxes, water rates and assessments for the year, (3) a proportionate part of insurance premiums, bad debts, losses and claims for damages for injuries to persons or property not compensated for by insurance, (4) a proportionate part of the annual interest charge on the indebtedness hereby secured, and (5) an arbitrary allowance of twenty-five thousand dollars (\$25,000) on account of the Sinking Fund; and the balance remaining after offsetting said charges against the gross income

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shall be conclusively deemed to be the "residual net profits" of the Mortgagor for the quarter in question for the purposes of the Sinking Fund. Said report shall also show any arrears due the Sinking Fund accumulated from previous quarters, and the Mortgagor shall continue to file with the Sinking Fund Trustee similar reports showing the state of the Sinking Fund Account within thirty (30) days after the end of each succeeding quarter until all such arrears shall have been liquidated in full.

The Mortgagor may at any time make voluntary payments in any amount into the Sinking Fund, but such payments shall be in addition to and shall not be credited against the stipulated payments above specified.

The Sinking Fund Trustee, as often as it shall deem proper, and at least once in each period of six months, (commencing after the expiration of the first period of six months) shall publish, once in each calendar week for three successive weeks in two daily newspapers of general circulation in the Borough of Manhattan of the City of New York, a notice stating that certificates will be purchased by the Sinking Fund Trustee to an amount not exceeding the principal amount named in such notice and inviting written offers to be submitted to the Sinking Fund Trustee within a period to be fixed in said notice for the sale of certificates at prices to be named in such offers; and the Sinking Fund Trustee, to the extent of the moneys in its possession available therefor, shall purchase certificates so offered at the lowest prices at which they may be offered and at which the largest amount of certificates can be purchased under the terms of said offers, provided that no such offers shall be accepted by the Sinking Fund Trustee at prices exceeding 104% of the face value of such certificates and accrued interest up to and including June 1, 1921, and thereafter at prices not

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exceeding 103% of such face value and accrued interest up to and including June 1, 1929, and thereafter at prices not exceeding 102% of such face value and accrued interest up to and including June 1, 1934, and thereafter at prices not exceeding 101% of such face value and accrued interest. Should there be two or more offers to sell certificates at the same price aggregating more than the amount of the moneys available after the acceptance of all offers at lower prices, such offers shall, if possible under their terms, and as nearly as possible, be accepted pro rata.

If the offers received in pursuance of the said notice within forty-five (45) days after the first publication thereof, and acceptable and accepted as aforesaid, shall not be sufficient to exhaust the said moneys in the possession of the Sinking Fund Trustee, the latter may thereafter purchase other certificates in any other manner which it may deem advisable, at not exceeding the prices above specified and to the extent of the moneys so available.

Whenever after the expiration of ninety (90) days from the date of the first publication of said notice, there shall remain in the hands of the Sinking Fund Trustee the sum of at least fifty thousand dollars (\$50,000), which the Sinking Fund Trustee has not been able to expend in the purchase of certificates as aforesaid, the Sinking Fund Trustee shall draw by lot for redemption on the next succeeding semi-annual interest date an amount of certificates sufficient to absorb such unapplied moneys, as nearly as may be, at 104% of the face value thereof and accrued interest up to and including June 1, 1924, and thereafter at 103% of the face value thereof and accrued interest up to and including June 1, 1929, and thereafter at 102% of the face value thereof and accrued interest up to and including June 1, 1934, and thereafter at 101% of the face value thereof and accrued interest.

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76 The Sinking Fund Trustee shall thereupon publish in two daily newspapers of general circulation in the Borough of Manhattan of the City of New York, once a week for three successive calendar weeks; the first publication to be not less than thirty (30) days before such semi-annual interest date, a notice of intention to redeem the certificates so drawn, specifying the same by their serial numbers, and requiring that they be presented for payment and redemption on said date at the principal office of said Sinking Fund Trustee in the Borough of Manhattan of the City of New York. A notice of redemption shall also be mailed by the Sinking Fund Trustee at least thirty (30) days prior to said interest date, addressed to the respective registered owners of any such certificates so drawn, at the addresses appearing upon the registry books.

77 Notice of redemption having been thus given the certificates so called for redemption shall on the date designated in said notice become due and payable at the said principal office of the Sinking Fund Trustee at the said redemption price and accrued interest, and, upon the presentation and surrender thereof, with, in the case of certificates in coupon form, all interest coupons maturing on and subsequent to said date, such certificates shall be paid and redeemed at the said redemption price and accrued interest to said date, and after said date the certificates so called shall cease to bear further interest. All certificates purchased or redeemed by the Sinking Fund Trustee for the Sinking Fund shall be cancelled and shall be retained by the Mortgagee and no certificates in lieu thereof shall thereafter be issued.

78 Payments made by the Mortgagor into the Sinking Fund, either as hereinbefore required, or voluntarily, or as proceeds of property taken under the power of eminent domain, or to secure the release of any part of the mortgaged premises,

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shall not be considered or treated as payments on account of or in reduction of the indebtedness hereby secured, but such moneys shall be deemed to be additional collateral security for said indebtedness hereby secured until applied and expended by the Sinking Fund Trustee in the purchase or redemption of certificates as hereinabove provided. Nevertheless all certificates so purchased or redeemed and cancelled by the Sinking Fund Trustee, and all certificates so called for redemption, the holders or registered owners of which may have failed to present the same for payment on the redemption date, shall be considered and credited to the Mortgagor as payments on account of and in reduction of the principal of said indebtedness hereby secured, at their face value, and shall be so noted on the bond.

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* * * * *

The Guarantee executed by United States Realty and Improvement Company.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

GUARANTEE

Know All Men by These Presents, That

Whereas, Trinity Buildings Corporation of New York has executed and delivered to Guaranty Trust Company of New York, its certain bond for its First Mortgage Twenty-Year Five and One-Half Per Cent. Gold Loan in the principal sum of seven million dollars (\$7,000,000), dated June 1, 1919, and payable on the first day of June, 1939, with interest at the rate of five and one-half per cent. per annum, and has executed and delivered to said Trust Company, to secure the

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82 payment of said bond, a mortgage upon the premises and buildings known as the Trinity Building and the United States Realty Building in the City of New York; and

Whereas, the said Trust Company as the holder of said bond and mortgage has issued a series of certificates representing pro rata shares in said bond and mortgage in the aggregate principal sum of seven million dollars (\$7,000,000); and

83 Whereas, the undersigned United States Realty and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the "Realty Company" has purchased the entire issue of said certificates, and intends to resell the same, and, as a condition of such resale, and in order to induce the purchasers to accept and pay for said certificates, has agreed to guarantee unconditionally the said bond and mortgage and said Trinity Buildings Corporation of New York.

84 NOW, THEREFORE, in consideration of the premises, and FOR VALUE RECEIVED, United States Realty and Improvement Company, for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, its successors and assigns, and to the holders and registered owners from time to time of the said certificates for shares in said bond and mortgage, the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its said bond and mortgage, dated June 1, 1919, as and when the same shall become due and payable whether at maturity or by declaration or otherwise, and of the sinking fund payments and other sums and charges therein required to be paid by it, and as well the due performance and observance by said Trinity

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Buildings Corporation of New York of all the terms, conditions and covenants in said bond and mortgage contained on its part to be performed and observed; all demands and notice or notices of default or defaults being hereby waived.

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AND IT IS HEREBY FURTHER COVENANTED, STIPULATED AND AGREED, that in the event of default by said Trinity Buildings Corporation of New York under the terms of said bond and mortgage, and as often as any such default shall occur, no delay or omission by said Guaranty Trust Company of New York, its successors and assigns, or of the holders and registered owners for the time being of said certificates, to exercise any right, power or privilege consequent upon any such default, and no waiver of any such default or its consequences, shall in any wise affect or discharge the unconditional liability and responsibility of the undersigned Realty Company upon this guarantee.

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IN WITNESS WHEREOF, the undersigned Realty Company has caused these presents to be executed by its proper officers thereunto duly authorized, and its corporate seal to be hereunto affixed and duly attested, as of the first day of June, 1919.

United States Realty and Improvement Company

By Paul Starrett,
President

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(Corporate Seal)

Attest:

R. G. Babbage

Secretary

*Debtor's Petition for Arrangement.***Exhibit B.**

AMENDED

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MODIFICATION PLAN AND ARRANGEMENT

of

TRINITY BUILDINGS CORPORATION OF NEW YORK**FIRST MORTGAGE**

**TWENTY-YEAR FIVE AND ONE-HALF PER CENT.
SINKING FUND GOLD LOAN, DUE JUNE 1, 1939,
AND GUARANTEE THEREOF.**

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INTRODUCTORY STATEMENT

On June 1, 1919 Trinity Buildings Corporation of New York (hereinafter referred to as "Trinity") executed and delivered to Guaranty Trust Company of New York, as Mortgagee, its Bond and First Mortgage in the principal amount of \$7,000,000 to secure its First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan, due June 1, 1939. Share certificates therein were issued by Guaranty Trust Company of New York. Such First Mortgage covers the following properties:

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- (a) The Trinity Building, consisting of a parcel of land at No. 111 Broadway, New York, N. Y., on which is erected a twenty-one story office building, and
- (b) The United States Realty Building, consisting of a parcel of land at No. 115 Broadway, New York, N. Y., on which is erected a twenty-one story office building.

United States Realty and Improvement Company (hereinafter referred to as "Realty"), the holder of all of the

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outstanding capital stock of Trinity, executed and delivered to Guaranty Trust Company of New York, as Mortgagee, a Guarantee of such Bond and First Mortgage. Trinity owes Realty an unsecured debt in the amount of \$10,442,482.99 as of December 31, 1938.

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Through the operation of the sinking fund the principal amount of the outstanding certificates has been reduced to \$3,710,500. However, under the provisions of the Bond and First Mortgage and of the Mortgage Moratorium Law of the State of New York sinking fund payments of principal have been postponed in amounts aggregating \$597,144.32 as of December 31, 1938. All interest on the certificates has been paid to December 1, 1938, and real estate taxes on the premises to June 30, 1939, have been paid.

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Beginning with the year 1931 the rental income from the premises decreased steadily. The acute business recession which developed in the latter part of the year 1937 caused a greatly reduced demand for office space in the financial district of New York, seriously affecting the occupancy of the buildings and the rate of rental obtainable for space therein. As a result of the foregoing and of severe competition caused by overproduction of office space in the financial district and the shrinkage of the securities business, the income from the mortgaged premises has been insufficient to meet operating expenses, taxes and interest on the certificates for the past several years.

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The premises were assessed by the City of New York for tax purposes for the year 1938 at \$11,225,000, resulting in the payment of \$328,892.50 in real estate taxes for such year. The premises have been assessed for the year beginning July 1, 1939 at \$11,175,000; applications are pending for

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a material reduction of this assessment. The total income of Trinity for the year 1938 was \$915,029.49, whereas the total expenses (other than interest, depreciation and taxes) amounted to \$433,606.37, leaving, after deduction of taxes, only \$152,530.62 available for interest on the certificates. No improvement in existing conditions or in earnings is expected in the immediate future. Balance sheets as of December 31, 1938, and income statements for the last three years for both Trinity and Realty are annexed.

Although the Mortgage matures on June 1, 1939, in the opinion of counsel the provisions of the Mortgage Moratorium Law of New York State prevent any foreclosure or action on the Bond or Guarantee for principal, so long as interest and taxes are paid. Even if there were a default in interest or taxes permitting an action for principal on the Bond or on the Guarantee, the fair market value of the premises (believed to be well in excess of the amount of the Mortgage) could, in the opinion of counsel, be established as a set-off under the provisions of the New York statutes; in addition in foreclosure proceedings with respect to principal such fair market value could be offset against any claim for a deficiency judgment. Therefore, in the opinion of counsel, if foreclosure with respect to principal were instituted and such offset were established, Realty would by operation of law be released from further liability on its Guarantee. Such Mortgage Moratorium expires on January 1, 1940, and such Deficiency Judgment statutes expire on July 1, 1939, but it is believed that the latter will be extended.

Because of a predicted further decrease in earnings of the buildings for the year 1939 and the present conditions affecting real estate generally in the financial district of New York City where the premises are situated, Realty and Trinity

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hereby offer an "Amended Modification Plan and Arrangement" dated May 1, 1939, whereby the maturity of the Mortgage and of the Guarantee are to be extended and their terms modified.

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EXPLANATORY STATEMENT

Since there are two obligations to be dealt with under the Amended Modification Plan and Arrangement (hereinafter referred to as the "Plan", the "Arrangement" or the "Plan of Reorganization"), namely, the primary obligation of Trinity on its Bond and First Mortgage and the secondary obligation of Realty on its Guarantee, it is desirable to have two separate proceedings, the first, under Chapter XI of the Federal Bankruptcy Act for Realty in order to modify its Guarantee in accordance with the Plan, and the second, under the New York State Burchill Act (Sections 121-123 of the Real Property Law), for Trinity in order to modify the terms of its Bond and Mortgage. It is proposed in the first instance to modify the Guarantee of Realty as an independent transaction by an Arrangement under Chapter XI of the Bankruptcy Act, and thereafter, in the event such Arrangement is confirmed by the Court, to modify the obligation of Trinity by a reorganization under the Burchill Act so as to conform Trinity's obligation to the Guarantee as modified.

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The Burchill Act provides for a foreclosure of the Mortgage and the transfer of the properties to a New Company. It is contemplated that Guaranty Trust Company of New York, as Mortgagee, will be requested to institute proceedings thereunder after the Arrangement of Realty under Chapter XI is confirmed by the Court. Upon confirmation of the Arrangement, Realty will either execute and deliver a modified Guarantee to Guaranty Trust Company of New York,

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as Mortgagee, or upon the confirmation of the Plan of Reorganization under the Burchill Act will guarantee the bonds of the New Company, which bonds will take the place of the present certificates. Although the Amended Modification Plan and Arrangement is herein set forth as one plan for both the Bond and Mortgage of Trinity and the Guarantee thereof of Realty, two separate proceedings will be necessary for its complete consummation; further, although under the Plan the institution of the Burchill Act proceeding by Trinity will be dependent upon confirmation of the Arrangement under Chapter XI, such Arrangement for Realty is entirely independent of the Burchill Act reorganization for Trinity and will stand as an accomplished fact regardless of whether or not the primary obligation of Trinity is modified under the terms of the Plan. In any event, upon confirmation of the Arrangement, the Guarantee will be modified as herein set forth. The promulgation of the Plan, if not consummated, shall not constitute a waiver of the rights of Trinity or Realty or both to any and all rights granted under the statutes of the State of New York with respect to Mortgage Moratoria and deficiency judgments, nor of any rights of Guaranty Trust Company of New York, as Mortgagee.

TERMS OF PLAN

A—As to Bond and First Mortgage of Trinity and Shares
Therein

1—Security

There shall be no change in the physical security behind the present certificates. In the event the Plan is consummated under the Burchill Act with respect to the primary obligation of Trinity, the present certificates shall be con-

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verted into registered First Mortgage Bonds (hereinafter referred to as "New Bonds") issued under an Indenture with Guaranty Trust Company of New York, as Trustee, or some other trustee (hereinafter referred to as the "corporate Trustee") and secured by a first mortgage on the premises, the premises to be conveyed to a New Company which shall execute such Indenture. All New Bonds shall be fully registered.

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2—Principal Amount

There shall be no change in the principal amount (\$3,710,500) of the Mortgage. In the event the Burchill Act reorganization with respect to the primary obligation of Trinity is consummated, holders of present certificates shall receive par for par in New Bonds.

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3—Interest

The interest payment dates shall be changed from December 1 and June 1 to January 1 and July 1 and the interest rate shall be changed so that from and after December 1, 1938, the indebtedness shall bear fixed interest at the rate of 3% per annum (hereinafter referred to as "fixed interest"), and additional interest as hereinafter specified (hereinafter referred to as "additional interest") from the available net earnings after deposits in the Improvement Fund hereinafter described, which additional interest shall at maturity have equalled an amount equivalent to the sum of 1% per annum for the period December 1, 1938 to July 1, 1944 and 2% per annum for the period July 1, 1944 to maturity of the principal amount of outstanding New Bonds.

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Such interest shall be payable as follows:

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- (a) 3% per annum fixed interest payable on July 1, 1939, and semi-annually thereafter;
- (b) Additional interest shall be payable annually in respect of the preceding calendar year on March 10 in each year (beginning with March 10, 1940) on the New Bonds and shall consist of all available net earnings for such year as hereinafter described (after deduction of any deposit in the Improvement Fund hereinafter described), but the amount of additional interest shall not be in excess of an amount equal at the end of such year to 1% per annum from December 1, 1938 and 2% per annum from July 1, 1944 of the principal amount of outstanding New Bonds, less the aggregate of any amounts theretofore paid as additional interest. Additional interest shall be payable only in integral percentage amounts of $\frac{1}{4}$ of 1%, or any multiple thereof, of the principal amount of New Bonds then outstanding. On July 1, 1949 as additional interest for the period January 1, 1949 to July 1, 1949, there shall be payable, *absolutely whether or not earned*, an amount equal to the sum of 1% per annum for the period December 1, 1938 to July 1, 1944 and 2% per annum for the period July 1, 1944 to maturity of the principal amount of outstanding New Bonds, less the aggregate of any amounts theretofore paid as additional interest.

Under the present Revenue Act, interest on the New Bonds will be subject to Federal Income Tax without credit for the 2% heretofore paid by Trinity.

The interest payment to be due July 1, 1939 shall cover the seven months period from December 1, 1938 to July 1, 1939.

*Debtor's Petition for Arrangement: Exhibit B.**Improvement Fund*

In the event the Plan is consummated under the Burchill Act, all available net earnings (as hereinafter described) of the New Company for each calendar year, until and including the year 1948, but not in excess of \$50,000 for each year, shall be, on or before March 10 of the succeeding year, deposited in a special account with the corporate Trustee and be known as the "Improvement Fund". Such Improvement Fund shall be employed at such times, in such manners and for such purposes as the Board of Directors of the New Company may direct, but only upon the written consent of the corporate Trustee, for improvements, betterments and additions to the mortgaged premises. If in any year, so long as any New Bonds are outstanding, fixed interest is not earned thereon (in accordance with sound principles of accounting), the New Company shall be entitled to call upon the corporate Trustee to pay such interest for such year from any funds at the time on deposit in the Improvement Fund. Further, upon the written consent of the corporate Trustee, funds at any time on deposit in the Improvement Fund may be requisitioned by the Board of Directors of the New Company and applied to the sinking fund hereinafter described: provided, however, that the sinking fund requirements hereinafter described shall not be credited with any Improvement Fund moneys so applied. If in any year the full \$50,000 is not available for the Improvement Fund from the available net earnings hereinafter described, there shall be no requirement that any amounts not earned and deposited in the Improvement Fund in such year be deposited therein from available net earnings of succeeding years. The Improvement Fund shall not become operative unless and until the Plan under the Burchill Act is consummated. Any funds

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remaining in the Improvement Fund at the maturity of the New Bonds shall be employed to redeem New Bonds or to purchase the same in the open market for retirement, and upon the payment of all New Bonds outstanding, the balance, if any, shall be repaid to the New Company:

5—Maturity

To be extended to July 1, 1949.

6—Redemption, Sinking Fund and Dividend Limitation

In the event the Plan is consummated under the Burchill Act, the New Company shall have the right at any time on thirty days' notice to redeem any or all of the New Bonds at 100% plus (a) unpaid fixed interest and (b) additional interest calculated to the date of redemption less the aggregate of any amounts theretofore paid as additional interest. Until such time as the principal amount of outstanding New Bonds shall have been reduced to \$2,500,000 all of the available net earnings (as hereinafter described) for each calendar year after deduction of (a) deposits in the Improvement Fund and (b) additional interest calculated to the close of such calendar year, shall be set aside in cash in a separate account on March 10 in each year as and for a sinking fund and employed by the New Company to redeem New Bonds or to purchase the same in the open market for retirement; provided, however, that in no event shall the setting aside of such moneys as and for a sinking fund reduce, as of the close of the preceding calendar year, the net current assets or cash of the New Company below \$50,000. (Any moneys deposited or to be deposited for such year in the Improvement Fund or moneys set aside as and for a sinking fund shall not be considered current assets or cash for the purposes of the foregoing calculation of net current assets or cash.) No

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dividends whatsoever shall be paid by the New Company until such time as the principal amount of outstanding New Bonds shall have been reduced to \$2,500,000 and thereafter no dividends shall be paid in any year in excess of an amount equal to amounts set aside in such year as and for a sinking fund to redeem New Bonds or to purchase the same in the open market for retirement; provided, however, that in no year, so long as any of the New Bonds remain outstanding, shall dividends paid by the New Company exceed \$50,000. All New Bonds purchased through the sinking fund shall be cancelled and shall not be reissued.

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7—Guarantee.

In the event the Arrangement under Chapter XI is confirmed, Realty shall unconditionally guarantee the due and punctual payment by Trinity, or the New Company, as the case may be, of *principal and interest* on the Bond and Mortgage as modified hereunder or on the New Bonds, as the case may be. The obligation of Realty as modified by the Arrangement shall be a Guarantee of principal with a maturity of July 1, 1949 and of fixed and additional interest as herein described. *The Guarantee of Realty shall be unconditionally and irrevocably modified in the event the Arrangement under Chapter XI of the Bankruptcy Act is confirmed*, regardless whether or not (a) the Burchill Act proceeding is instituted, (b) the Plan of Reorganization thereunder is approved by the Court, or (c) such Plan is consummated. A copy of the Guarantee in its proposed revised form is annexed hereto as Exhibit A.

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8—Salaries of Officers and Directors

In the event the Plan is consummated under the Burchill Act, the Indenture providing for the New Bonds shall pro-

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vide that the aggregate salaries of the officers and directors of and paid by the New Company shall not exceed in any year, so long as any of the New Bonds are outstanding, a sum equivalent to one percent (1%) of the gross income of the New Company for such year; but employees regularly engaged in the management or operation of the mortgaged property shall not be prohibited from acting as officers or directors of the New Company and from receiving salaries for such services as employees not subject to this limitation.

9—Amendments

The Indenture providing for the New Bonds and the Guarantee as modified under the Plan, shall contain provisions that any terms of either, including, without limitation, extension of the maturity or reduction of the interest rate, may be modified upon the written consent of holders of 66 2/3% or more in principal amount of certificates or New Bonds, as the case may be, then outstanding; provided, however, that holders of 20% or more in principal amount of certificates or New Bonds, as the case may be, then outstanding, do not dissent in writing thereto. Outstanding certificates or New Bonds, as the case may be, held by Realty or Trinity, or any subsidiary of either, shall not be so voted and shall not be included in the determination of outstanding certificates or New Bonds, as the case may be. Any such modifications shall be binding on all holders of certificates or New Bonds, as the case may be.

B—As to Other Obligations of Trinity and Realty

None of such obligations shall be affected by the Plan. The New Company, upon consummation of the Burchill Act reorganization, shall assume all obligations of Trinity except

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(a) the Bond and Mortgage and (b) the above-described indebtedness owing to Realty, and will receive all unmortgaged assets of Trinity.

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C—As to Common Stock of Trinity

Realty shall retain its present Common Stock interest in Trinity but upon consummation of the Burchill Act reorganization, shall receive all of the capital stock of the New Company.

EFFECTIVE DATE OF PLAN

The effective date of the Plan shall be December 1, 1938, as of which date all of the foregoing action in so far as practicable shall be taken. The New Bonds and the modified Guarantee shall be dated as of December 1, 1938, and shall bear interest under the Plan from such date. All modifications of rights and interests herein described shall take place in so far as practicable as of December 1, 1938.

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COMPUTATION OF EARNINGS

The net earnings of the New Company for calculating the amounts payable for the Improvement Fund and for additional interest (herein referred to as "available net earnings") shall be determined for each calendar year. (The first such computation, however, shall be made for the thirteen months period December 1, 1938 to December 31, 1939.) The available net earnings for each such annual period shall be the net income determined by deducting from gross income for such period calculated on an accrual basis according to good accounting practice the following items:

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- (a) Operating expenses paid and accrued, including, without limiting the generality of the foregoing, wages,

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supplies, gas, electricity, steam, telephone, maintenance, repairs, replacements, changes or alterations required by tenants or required by any public authority or required by any insurance underwriters or board of underwriters, and losses and damages not compensated by insurance or otherwise, and commissions payable to brokers for leases, irrespective of their duration; expenses of reasonable salaries and other expenses in maintaining the corporate organization; fees and compensation of transfer agents and registrars; bad debts; legal and other expenses incurred in the business or in connection with the buildings; legal expenses incurred in the collection of rents, controversies and litigation, and accounting fees and expenses; and reasonable provision for doubtful accounts. *Nothing in this paragraph (a) contained shall be deemed to authorize the deduction, for the purpose of determining available net earnings, of any charge for depreciation or obsolescence, but without prejudice, however, to the right of the New Company to claim any such deduction in connection with any tax return or tax liability.* Where the cost of repairs, replacements, changes or alterations referred to in this paragraph (a) may be paid for in instalments over more than one annual period or where such costs may be financed by the making of loans so payable, the same may be distributed instead of being deducted in one annual period and such deduction may, at the option of the New Company, be made in each annual period, regardless of whether or not by reason of such distribution over annual periods charges for interest or penalties may be incurred;

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- (b) Payments of and accruals for all real estate, income, social security, franchise, undistributed profits taxes and all other taxes whatsoever without limitation; for assessments and water rents; for insurance and for interest on debts of or loans to the New Company; 127
- (c) Accruals for fixed interest on the New Bonds;
- (d) Payment, to the extent not reimbursed by Realty as hereinafter set forth, of reorganization expenses which at the option of the New Company may be amortized over a period not exceeding five years.

For the purpose of computation of available net earnings, no profit shall be recognized by the New Company or included as income for such purpose which may arise or accrue by virtue of the purchase or retirement of New Bonds at less than the principal amount thereof. 128

Such available net earnings shall be determined in accordance with the foregoing by a firm of certified public accountants of recognized standing to be selected by the Board of Directors of the New Company and to be satisfactory to the corporate Trustee. The New Company shall deliver to the corporate Trustee on or before March 1 in each year, beginning on March 1, 1940, a statement certified to by such firm of certified public accountants showing the amount of available net earnings of the New Company for the preceding year ending December 31 determined in accordance with the foregoing and the figures and reasonable detail upon which the computation thereof is based. Such statements shall be available to holders of New Bonds at the offices of the New Company and at the office of the corporate Trustee. 129

*Debtor's Petition for Arrangement: Exhibit B.***EXPENSES**

130 All expenses in connection with the Plan both with respect to the proceeding under Chapter XI of the Federal Bankruptcy Act and the proceeding under the New York State Burchill Act will be paid, respectively, by Realty and Trinity or the New Company, as the case may be. A major portion of such expenses will be subject to judicial approval. Realty, however, will reimburse Trinity for expenses paid by it up to a maximum of \$25,000.

**ALTERATIONS OR MODIFICATIONS OF OR
ABANDONMENT OF PLAN**

131 Trinity and Realty severally reserve the right at any time before the consummation of the Plan to propose alterations or modifications thereof which unless materially and adversely affecting the interest of certificateholders shall be binding on all certificateholders who shall have prior thereto accepted the Plan. Whether or not any of such alterations or modifications shall materially and adversely affect the interest of certificateholders shall be subject to a finding by the Court.

In addition, Trinity and Realty severally reserve the right to abandon the Plan at any time prior to its consummation.

132

METHOD OF CONSUMMATION OF PLAN

As hereinabove set forth the Plan which is an Arrangement as to Realty will be effected in the first place under the provisions of Chapter XI of the Federal Bankruptcy Act with respect to the Guarantee of Realty. Upon the confirmation of the Arrangement for Realty under the aforesaid Chapter XI (which will stand as an independent transaction irrespective of the consummation of the Plan with respect to Trinity) it is contemplated that Guaranty Trust Company of New York, as Mortgagee, will be requested to institute a fore-

Debtor's Petition for Arrangement: Exhibit B.

closure under the New York State Burchill Act in order to consummate the Plan with respect to the obligation of Trinity on its Bond and Mortgage and the certificates therein. Acceptances of holders of certificates will constitute both an acceptance of the Arrangement under the aforesaid Chapter XI and of the Plan of Reorganization under the Burchill Act.

133

Guaranty Trust Company of New York, as Mortgagee, under the Plan shall be requested to bid at the foreclosure sale a minimum of \$100,000 for the premises and a maximum amount of the principal amount of the Mortgage, plus accrued interest, taxes and other charges thereunder, subject to such variations in said sums as the Court may direct. Trinity and Realty severally reserve the right to apply to the Court that said maximum amount be increased by the indebtedness owing by Trinity to Realty (in the principal amount as of December 31, 1938 of \$10,442,482.99), such indebtedness to be assigned to Guaranty Trust Company of New York, as Mortgagee, to protect it in bidding such increased amount if authorized by the Court. In any event, Guaranty Trust Company of New York, as Mortgagee, shall be directed in the acceptance of the Plan to bid for the premises, if necessary, up to the maximum amount herein set forth or such other maximum amount as may be fixed by the Court.

134

The following provisions are also included in the Plan for further defining rights and for simplifying the procedure to be followed:

135

A—With respect to the Arrangement for Realty

- 1—The sole creditors of Realty to be affected by the Arrangement will be holders of certificates and Guaranty

Debtor's Petition for Arrangement: Exhibit B.

136 Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee. All other creditors of Realty are not to be affected by the Arrangement. Therefore, creditors of Realty for the purposes of the Arrangement and its acceptance are divided into classes as follows:

- (i) Holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee;
- (ii) All other creditors.

137 2—The acceptance is also to constitute a proof of claim in the Arrangement proceedings. Proofs of claim are not to be filed by any other creditors since no other creditors will be affected by the Arrangement. Such acceptances are to be delivered by holders of certificates to Trinity for filing in Court at or before the first meeting of creditors.

138 3—There is not to be any deposit of the consideration to be distributed to creditors or money to pay debts which have priority, since all debts, with the exception of the liability under the Guarantee, are to be paid as they become due, including debts incurred prior to the institution of the Chapter XI proceeding and debts incurred during the pendency thereof.

4—No trustee or receiver is to be appointed and Realty is to remain in possession and control of its assets as debtor in possession. Realty is to continue its operations, meeting its obligations as they become due and paying its officers and other expenses as if no Chapter XI proceeding were pending.

Debtor's Petition for Arrangement: Exhibit B.

5—No appraiser or appraisers are to be appointed by the Court to prepare any inventory or appraisal of the property of Realty.

139

6—None of the executory contracts of Realty are to be affected under or by the Arrangement since none are to be rejected thereunder.

7—The Court will retain jurisdiction of Realty in the Chapter XI proceeding at least until (i) the consummation of the Arrangement (which is entirely independent of the institution or consummation of the Plan of Reorganization for Trinity under the Burchill Act); or (ii) confirmation of the Plan under the Burchill Act for Trinity, whichever is sooner.

140

8—Realty may apply to the Court in the Chapter XI proceeding for an injunction and stay until final decree of the commencement or continuation of suits or other proceedings against it with respect to the Guarantee in order that no litigation interfere with the progress of the Arrangement.

9—The institution, confirmation or consummation of the Arrangement shall not (i) constitute a waiver or release of any and all rights and defenses which Realty is presently entitled to under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the maturity of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates.

141

*Debtor's Petition for Arrangement: Exhibit B***B—With respect to the Plan of Reorganization for Trinity**

142 1—Neither the Burchill Act proceeding nor any other action or proceeding is to be instituted under the Plan by the Mortgagee or holders of certificates until the Arrangement for Realty has been confirmed in the Chapter XI proceeding.

143 2—The institution, confirmation or consummation of the Arrangement for Realty and the Plan of Reorganization under the Burchill Act for Trinity or of the proceedings for either or both shall not (i) constitute a waiver or release of any and all rights and defenses to which Realty and Trinity or either of them are presently entitled under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the ~~maturity~~ of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates.

3—No deficiency judgment or judgment on the Bond or Guarantee is to be entered under the Plan either against Realty or Trinity in the Burchill Act proceeding.

144 4—Nothing in the Plan is to affect existing leases of Trinity. All executory contracts of Trinity will be assumed by the New Company under the Plan and none will be rejected or in any manner affected thereunder.

5—The acceptance is also to constitute a direction to Guaranty Trust Company of New York, as Mortgagee, to institute and prosecute the foreclosure under the Burchill Act, to present the Plan to the Court with its

Debtor's Petition for Arrangement: Exhibit B.

petition for foreclosure, and to recite in such petition the number of acceptances received by Trinity, whether or not the same have been filed in the Arrangement proceedings. The acceptance, in addition, will authorize Trinity and Guaranty Trust Company of New York, as Mortgagee, or either of them, if necessary, to obtain certified copies of any acceptances on file in the Arrangement proceedings and to present them to the Court in the Burchill Act proceeding.

145

- 6—It is contemplated that prior to the institution of the Burchill Act proceeding, Trinity will deposit all rents thereafter collected from the mortgaged premises in a special account to be employed for taxes, operation and maintenance of the premises and other expenses upon the order or orders of the Court in such proceeding. At such time as the Plan under the Burchill Act is either consummated or abandoned, the funds in such account will, subject to contrary order of the Court, revert, free and clear, to Trinity or the New Company, as the case may be. In addition, Guaranty Trust Company of New York, as Mortgagee, will be requested to include in its petition for foreclosure a prayer that no receiver of the mortgaged premises or the rents therefrom be appointed.

146

The consummation of the Plan with respect to Realty will be subject to appropriate orders of the Federal Court and with respect to Trinity to appropriate orders of the New York State Court.

147

CONCLUSION

In order to confirm the Arrangement under the aforesaid Chapter XI, and to make the Plan binding on all holders of certificates, written acceptances by the holders of a majority in number and amount of outstanding certificates, whose claims have been proved and allowed, are required. In order to effectuate the Plan under the Burchill Act, it must be

MICRO CARD

TRADE

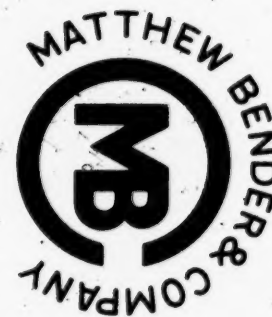
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22

39

651



65



Debtors Petition for Arrangement: Exhibit B.

presented to the Court by the Mortgagee or by persons owning or representing 25% of the outstanding certificates and dissents must not have been filed with the Court by holders of one-third of such certificates within twenty days after the approval of the Plan by the Court. In order to confirm the Arrangement the Federal Court must be satisfied that, among other things, it is for the best interests of the creditors and that it is fair and equitable and feasible. In order to effectuate the Plan under the Burchill Act, hearings with respect thereto must be held before the New York State Court.

Guaranty Trust Company of New York, as Mortgagee, has stated that it does not wish at this time to approve or disapprove or to sponsor either the Plan or any other plan or to commit itself to present the same to any Court and that nothing in the Plan should be so construed.

The officers of both Realty and Trinity will be pleased to furnish any further information or explanations desired regarding the Plan and will be available at their offices, 111 Broadway, New York, N. Y.

BY ORDER OF THE BOARD OF DIRECTORS
OF
UNITED STATES REALTY AND
IMPROVEMENT COMPANY

EDWIN J. BEINECKE
President

BY ORDER OF THE BOARD OF DIRECTORS
OF
TRINITY BUILDINGS CORPORATION
OF NEW YORK

DOUGLAS GRANT SCOTT
President

Dated: May 1, 1939.

Balance Sheet as at December 31, 1938.

(See Opposite)

TRINITY BUILDINGS CORPORATION OF NEW YORK

BALANCE SHEET AS AT DECEMBER 31, 1938.

ASSETS

Cash	\$	10,505.72
Accounts, notes and accrued interest receivable, less reserves of \$38,573.40.....		20,744.61
Inventories of materials and supplies.....		4,419.80
Total Current Assets.....	\$	35,670.13
Sinking fund deposit.....		114.54
Miscellaneous investments, less Reserve of \$15,399.00 (Including securities having a book value of \$2,526.75 deposited as collateral under various agreements).....		2,529.75
Real estate and buildings at cost (See Note 1).....	\$16,396,318.35	
Less—Reserve for depreciation.....	1,646,356.24	14,749,962.11
Office furniture and fixtures.....		5,479.33
Prepaid expenses and deferred charges:		
Prepaid expenses, etc.....	\$ 13,613.67	
Deferred cost of building alterations.....	2,812.00	16,425.67
		<u>\$14,810,181.53</u>

LIABILITIES

Note Payable, 4%, due January 30, 1939 (Endorsed by United States Realty and Improvement Company)	\$	10,000.00
Accounts payable		42,482.28
Accrued interest, taxes and wages.....		23,133.84
Total Current Liabilities (Exclusive of Mortgage maturing June 1, 1939 and indebtedness to United States Realty and Improvement Company).....	\$	75,616.12
Rents received in advance.....		1,728.33
United States Realty and Improvement Company:		
Note due June 1, 1939.....	\$ 8,781,192.44	
Open account	1,661,290.55	10,442,482.99
Reserve for plate glass breakage.....		4,266.61
First Mortgage, Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments)—(See Note 2).....		3,710,500.00
Capital Stock:		
Authorized and issued—1,000 shares without par value—stated value.....		1,000,000.00
Deficit		424,412.52
Contingent Liabilities (See Note 3)		
		<u>\$14,810,181.53</u>

NOTES:

- (1) The amount shown on this balance sheet with respect to real estate and buildings does not purport to be the present or replacement or realizable value. Based upon present conditions in the real estate industry, the book value of real estate and buildings is undoubtedly in excess of the present market value. The accumulated amounts taken for depreciation for income tax purposes are greatly in excess of the amounts provided on the books.
- (2) Sinking fund instalments in the amount of \$372,144.32 were postponed during 1935, 1936, 1937 and 1938 under the provisions of the Mortgage. In addition, sinking fund payments of \$225,000.00 due in 1936, 1937 and 1938 were postponed under the Moratorium Law of the State of New York.

Cash	\$ 10,505.72
Accounts, notes and accrued interest receivable, less reserves of \$38,573.40.....	20,744.61
Inventories of materials and supplies.....	4,419.80
Total Current Assets.....	\$ 35,670.13
Sinking fund deposit.....	114.54
Miscellaneous investments, less Reserve of \$15,399.00 (Including securities having a book value of \$2,526.75 deposited as collateral under various agreements).....	2,529.75
Real estate and buildings at cost (See Note 1).....	\$16,396,318.35
Less—Reserve for depreciation.....	1,646,356.24
	14,749,962.11
Office furniture and fixtures.....	5,479.33
Prepaid expenses and deferred charges:	
Prepaid expenses, etc.....	\$ 13,613.67
Deferred cost of building alterations.....	2,812.00
	16,425.67
	\$14,810,181.53

LIABILITIES

Note Payable, 4%, due January 30, 1939 (Endorsed by United States Realty and Improvement Company)	\$ 10,000.00
Accounts payable	42,482.28
Accrued interest, taxes and wages.....	23,133.84
Total Current Liabilities (Exclusive of Mortgage maturing June 1, 1939 and indebtedness to United States Realty and Improvement Company).....	\$ 75,616.12
Rents received in advance.....	1,728.33
United States Realty and Improvement Company:	
Note due June 1, 1939.....	\$ 8,781,192.44
Open account	1,661,290.55
	10,442,482.99
Reserve for plate glass breakage.....	4,266.61
First Mortgage, Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments)—(See Note 2).....	3,710,500.00
Capital Stock:	
Authorized and issued—1,000 shares without par value—stated value.....	1,000,000.00
Deficit	424,412.52
Contingent Liabilities (See Note 3)	
	\$14,810,181.53

NOTES:

- (1) The amount shown on this balance sheet with respect to real estate and buildings does not purport to be the present or replacement or realizable value. Based upon present conditions in the real estate industry, the book value of real estate and buildings is undoubtedly in excess of the present market value. The accumulated amounts taken for depreciation for income tax purposes are greatly in excess of the amounts provided on the books.
- (2) Sinking fund instalments in the amount of \$372,144.32 were postponed during 1935, 1936, 1937 and 1938 under the provisions of the Mortgage. In addition, sinking fund payments of \$225,000.00 due in 1936, 1937 and 1938 were postponed under the Moratorium Law of the State of New York.
- (3) Contingent Liabilities:
This company filed its Federal income tax return for 1933 in consolidation with United States Realty and Improvement Company and there is a proposed deficiency for that year which is being contested. The Company's Federal income tax returns for the years 1935 to 1938, inclusive, are subject to review by the United States Treasury Department.

TRINITY BUILDINGS CORPORATION OF NEW YORK

INCOME ACCOUNTS

For the Three Years ended December 31, 1938.

Particulars	Year ended December 31,		
	1936	1937	1938
Operating revenues (After deducting provision for doubtful accounts)	\$1,011,822.74	\$1,047,237.60	\$ 913,672.87
Less:			
Operating expenses	344,533.57	363,066.14	346,304.11
Repairs and tenant changes	158,751.90	136,927.99	45,966.15
New York City real estate taxes	324,000.00	328,440.00	328,892.50
Insurance	18,393.81	17,586.98	16,406.36
	<u>\$ 845,679.28</u>	<u>\$ 846,021.11</u>	<u>\$ 737,569.12</u>
Net operating revenues before depreciation	\$ 166,143.46	\$ 201,216.49	\$ 176,103.75
Add:			
Other income	1,455.07	1,790.14	1,356.62
	<u>\$ 167,598.53</u>	<u>\$ 203,006.63</u>	<u>\$ 177,460.37</u>
Deduct:			
Corporate and general expense including Trustees' fees, mortgage bond expense, Federal and State social security taxes, State franchise and Federal capital stock taxes	\$ 15,133.60	\$ 19,712.06	\$ 24,929.75
Interest on mortgage loan	207,220.00	204,077.50	204,077.50
	<u>\$ 222,355.60</u>	<u>\$ 223,789.56</u>	<u>\$ 229,007.25</u>
Net loss before depreciation	\$ 54,757.07	\$ 20,782.93	\$ 51,546.88
Depreciation on office buildings and furniture and fixtures	185,090.53	184,965.98	184,508.17
Net loss	<u>\$ 239,847.60</u>	<u>\$ 205,748.91</u>	<u>\$ 236,055.05</u>

UNITED STATES REALTY AND IMPROVEMENT COMPANY

BALANCE SHEET AS AT DECEMBER 31, 1938.

ASSETS

Current Assets:

Cash	\$ 416,775.82
Accounts, notes, accrued interest and dividend receivable	\$ 33,050.55
Less—Reserve for doubtful accounts	8,743.53
Note receivable—Plaza Operating Company, 4% due April 30, 1939 (Deposited as collateral to Note Payable of \$175,000.00)	175,000.00
Total Current Assets	\$ 616,082.84

Sinking Fund Deposit 60.14

Investments in and Advances to Subsidiaries:

Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	\$11,442,482.99
Lawyers Building Corporation	1,309,059.46
G. A. F. Realty Corporation	500.00
Whitehall Improvement Corporation (Including mortgage receivable of \$4,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	7,676,445.59
Plaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00, 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each—stated at nominal value	1.00
	20,428,489.04

Investment in George A. Fuller Company—

7,786 shares of 4% Cumulative Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(Of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are deposited as collateral to Note Payable of \$175,000.00)	786,493.00
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Mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds (See Note 1) 682,317.10

Unimproved real estate	\$ 953,213.55
Less—Reserve for depreciation	2,340.03
	950,873.52

Office furniture and fixtures 1,458.18

Prepaid expenses, etc. 13,200.48

\$23,478,974.30

UNITED STATES REALTY AND IMPROVEMENT COMPANY

BALANCE SHEET AS AT DECEMBER 31, 1938.

LIABILITIES

Current Liabilities:

Accounts payable	
Accrued taxes and interest	
Note payable, 4%, due \$37,500.00 on March 30, 1939 (Secured by pledge of 7,334 shares of 4% Preferred Stock and 3,667 shares of Common Stock and \$175,000.00 Note of Plaza Operating Company)	
6% Debenture Note due February 1, 1938 (Not yet due)	

Total Current Liabilities (Exclusive of sinking fund payments due within one year) 24,307.02

Rent received in advance 60.14

Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—See Note 3)

Less—Held in treasury (See Note 3) 786,493.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$182,000.00 principal amount retired) (See Note 3) 682,317.10

Less—Held in treasury 1,458.18

Note Payable, 4%, due August 12, 1939 (Secured by inter-company mortgage of \$4,000,000.00 on Whitehall Improvement Corporation) 950,873.52

Reserves:

For possible losses on investments, etc.—Unapplied balance 13,200.48

Other reserves (Including reserve for depreciation on real estate of subsidiaries—\$153,230.06) 1,458.18

Capital Stock:

Authorized and issued—900,000 shares without par value 13,200.48

Deficit 1,458.18

Contingent liabilities (See Note 4) 13,200.48

Cash		\$ 416,775.82
Accounts, notes, accrued interest and dividend receivable.....	\$ 33,050.55	
Less—Reserve for doubtful accounts.....	8,743.53	24,307.02
Note receivable—Plaza Operating Company, 4% due April 30, 1939 (Deposited as collateral to Note Payable of \$175,000.00).....		175,000.00
Total Current Assets.....		\$ 616,082.84
Sinking Fund Deposit.....		60.14
Investments in and Advances to Subsidiaries:		
Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	\$11,442,482.99	
Lawyers Building Corporation.....	1,309,059.46	
G. A. F. Realty Corporation.....	500.00	
Whitehall Improvement Corporation (Including mortgage receivable of \$4,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	7,676,445.59	
Plaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00, 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each—stated at nominal value.....	1.00	20,428,489.04
Investment in George A. Fuller Company—		
7,786 shares of 4% Cumulative Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(Of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are deposited as collateral to Note Payable of \$175,000.00).....		786,493.00
Mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds (See Note 1).....		682,317.10
Unimproved real estate.....	\$ 953,213.55	
Less—Reserve for depreciation.....	2,340.03	950,873.52
Office furniture and fixtures.....		1,458.18
Prepaid expenses, etc.....		13,200.48
		<u>\$23,478,974.30</u>

The amounts shown on this balance sheet with respect to investments and real estate do not purport to be present or replacement or realizable values. Based upon present conditions in the real estate industry, some of the book values are undoubtedly in excess of present market values. Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amounts at which they are carried, particularly the investment in Plaza Operating Company. See page 14 for Notes 1, 2, 3 and 4 which form an integral part of this balance sheet.

Current Liabilities:

Accounts payable	
Accrued taxes and interest.....	
Note payable, 4%, due \$37,500.00 on March 30, 1939 (Secured by pledge of 7,334 shares of 4% Preferred Stock and 3,667 shares of Common Stock and \$175,000.00 Note of Plaza Operating Company)	
6% Debenture Note due February 1, 1938 (Not)	
Total Current Liabilities (Exclusive of and sinking fund payments due within one year).....	

Rent received in advance.....

Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1939 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as principal, interest and sinking fund payments—See Note 3).....

Less—Held in treasury (See Note 3).....

6% Sinking Fund Debentures due January 1, 1944 of United States Realty and Improvement Company (less \$182,000.00 principal amount retired (See Note 3).....

Less—Held in treasury.....

Note Payable, 4%, due August 12, 1939 (Secured by inter-company mortgage of \$4,000,000.00 on Whitehall Improvement Corporation).....

Reserves:

For possible losses on investments, etc.—Unapplied for depreciation on real estate—December 31, 1938.....

Other reserves (Including reserve for depreciation on real estate of subsidiaries—\$153,230.06).....

Capital Stock:

Authorized and issued—900,000 shares without par value.....

Deficit

Contingent liabilities (See Note 4).....

Current Liabilities:

Accounts payable	\$ 9,515.33
Accrued taxes and interest.....	95,707.27
Note payable, 4%, due \$37,500.00 on March 30, 1939 and \$137,500.00 on April 30, 1939 (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$175,000.00 Note of Plaza Operating Company)	175,000.00
6% Debenture Note due February 1, 1938 (Not yet presented for payment).....	1,000.00

Total Current Liabilities (Exclusive of Note Payable of \$3,000,000.00 and sinking fund payments due within one year).....	\$ 281,652.60
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Rent received in advance.....	200.00
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Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—See Note 3).....	\$2,237,500.00	
Less—Held in treasury (See Note 3).....	1,026,000.00	\$1,211,500.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$182,000.00 principal amount retired) (See Note 3).....	\$1,219,000.00	
Less—Held in treasury.....	79,500.00	1,139,500.00

Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$4,000,000.00 on Whitehall Building).....	3,000,000.00	5,351,000.00
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Reserves:

For possible losses on investments, etc.—Unapplied balance, December 31, 1938.....	\$ 483,258.14	
Other reserves (Including reserve for depreciation provided in prior years on real estate of subsidiaries—\$153,230.06).....	168,201.70	651,459.84

Capital Stock:

Authorized and issued—900,000 shares without par value—stated value.....	18,000,000.00
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Deficit	805,338.14
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Contingent liabilities (See Note 4)

\$23,478,974.30

NOTES TO THE BALANCE SHEET

As at December 31, 1938

- (1) Voting trust certificates representing 8,576 shares of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for the fund and principal at maturity of G. A. F. Realty Corporation 6% Gold Debentures and as security for the 6% Gold Debentures of 1944, of United States Realty and Improvement Company. In the event such stock to Fuller Building Corporation is sold, the proceeds will be used to pay the principal and interest on the debentures by that corporation.
- (2) Sinking fund payments due within one year—
G. A. F. Realty Corporation, Fifteen-Year Sinking Fund Debentures (which may be paid in cash or in debentures of United States Realty and Improvement Company) due on May 1, 1944—\$14,375.00 on May 15 and November 1, 1944. The Company has no sinking fund payments due on debentures which may be used for sinking fund payments.
- (3) The 6% Sinking Fund Debentures of United States Realty and Improvement Company are being issued pursuant to a Trust Agreement with the Fuller Building Corporation in exchange for 6% Debentures of the Fuller Building Corporation. The 6% Debentures so acquired, are shown as held in treasury.
- (4) Contingent Liabilities—
 - (a) Guarantee of the principal, interest and sinking fund payments on the Twenty-Year Five and One-half Per Cent Sinking Fund Debentures of Trinity Buildings Corporation of New York, which were outstanding at December 31, 1938, totaling \$372,144.32 were postponed in 1935, 1936, 1937 and 1938. In addition, sinking fund payments on the 1938 debentures were postponed under the Moratorium Act.
 - (b) Endorsement of the note payable for \$10,000.00 to the Fuller Building Corporation of New York, which note has since been paid.
 - (c) Proposed deficiency in Federal income taxes for the years 1937 and 1938, approximately \$45,000.00. The company's Federal income taxes for 1937 and 1938, inclusive, are subject to review by the United States Treasury Department.
 - (d) A proposed assessment of intangible personal property of the Fuller Building Corporation, N. J., for the years 1937 and 1938 in an independent valuation.
 - (e) The Company reports no further contingent liabilities, litigation, claims for personal injuries, etc., which will not result in losses of any consequence.

ANCE SHEET

31, 1938.

res of Class "B" Common Stock of Fuller
ted States Realty and Improvement Company
curity for its guarantees of interest, sinking
alty Corporation Fifteen-Year Sinking Fund
% Sinking Fund Debentures, due January 1,
Company, subject to an agreement to sur-
in the eventuality of a lack of certain earn-

sinking Fund 6% Gold Debentures—\$153,000.00
es at the redemption price of 102). United
holds \$1,026,000.00 principal amount of these
fund purposes.

pany, 6% Sinking Fund Debentures due Janu-
ber 15, 1939 for each \$500.00 principal amount
y be paid in cash or in debentures at the re-
olds \$79,500.00 principal amount of these de-
d purposes. (See Note 3.)

tes Realty and Improvement Company were
and the Reorganization Plan of G. A. F. Realty
latter company on a par for par basis. G. A. F.
less amounts used for sinking fund purposes,

ng fund payments on the First Mortgage
sinking Fund Gold Loan Certificates, dated June
New York. \$3,710,500.00 principal amount of
er 31, 1938. Sinking fund instalments aggre-
6, 1937 and 1938 under the provisions of the
s aggregating \$225,000.00 due in 1936, 1937
n Law of the State of New York.

due January 30, 1939 of Trinity Buildings
e been paid.

or 1933 which is being contested—approxi-
income tax returns for the years 1935 to 1938
States Treasury Department.

property taxes by the City of Jersey City,
terminate amount.

ilities except in respect of pending routine
hich, in the opinion of the Company's counsel,

INCOME ACCOUNT
For the Three Years ended

Particulars

Operating Revenues:

Rental income from a subsidiary dissolved during
Rental income from other tenants (after deducting
provisions for doubtful accounts)
Total operating revenues

Deduct:

Operating expenses
Real estate taxes

Net operating loss before depreciation

Other Income:

Interest from Subsidiaries—
Whitehall Improvement Corporation
Plaza Operating Company
Other interest
Dividends
Discounts, etc.

Deduct:

General and corporate expenses
Rent paid to a subsidiary
State franchise and Federal capital-stock taxes
Federal and State social security taxes

Net income before interest charges and depreciation

Interest Charges:

6% Debenture Notes
Fifteen-Year Sinking Fund 6% Gold Debentures
G. A. F. Realty Corporation
6% Sinking Fund Debentures of United States Realty
and Improvement Company
Notes payable

Net loss before depreciation

Depreciation, as provided by the Company:

Buildings
Office furniture and fixtures

Net loss

ACCOUNTS

ed December 31, 1938.

Year ended December 31,

	1936	1937	1938
1937	\$ 7,007.40	\$ 373.66	\$
ting	11,501.98	13,154.91	9,280.97
	<u>\$ 18,509.38</u>	<u>\$ 13,528.57</u>	<u>\$ 9,280.97</u>
	\$ 2,451.77	\$ 2,347.91	\$ 1,919.47
	44,798.26	24,616.89	11,785.92
	<u>\$ 47,250.03</u>	<u>\$ 26,964.80</u>	<u>\$ 13,705.39</u>
	<u>\$ 28,740.65</u>	<u>\$ 13,436.23</u>	<u>\$ 4,424.42</u>
	\$313,518.96	\$313,518.96	\$313,518.96
	18,141.64	18,114.93	10,859.73
	4,150.75	9,586.34	18,266.25
			33,644.00
	571.79	1,026.28	1,185.23
	<u>\$336,383.14</u>	<u>\$342,246.51</u>	<u>\$377,474.17</u>
	<u>\$307,642.49</u>	<u>\$328,810.28</u>	<u>\$373,049.75</u>
	\$134,576.06	\$100,312.96	\$ 81,656.48
	13,278.00	13,047.00	10,787.00
	21,392.97	23,263.58	16,676.05
	699.24	1,989.63	2,145.41
	<u>\$169,946.27</u>	<u>\$138,613.17</u>	<u>\$111,264.94</u>
de-	<u>\$137,696.22</u>	<u>\$190,197.11</u>	<u>\$261,784.81</u>
	\$ 22,245.67	\$ 21,695.37	\$ 1,646.67
s of	108,005.00	79,075.33	73,564.50
alty	46,065.83	69,726.59	68,467.34
	152,266.64	141,470.95	142,632.62
	<u>\$328,583.14</u>	<u>\$311,968.24</u>	<u>\$286,311.13</u>
	<u>\$190,886.92</u>	<u>\$121,771.13</u>	<u>\$ 24,526.32</u>
	\$ 14,358.62	\$ 9,475.60	\$ 325.00
	455.01	364.01	364.54
	<u>\$ 14,813.63</u>	<u>\$ 9,839.61</u>	<u>\$ 689.54</u>
	<u>\$205,700.55</u>	<u>\$131,610.74</u>	<u>\$ 25,215.86</u>

Debtor's Petition for Arrangement: Exhibit B.

EXHIBIT A.

178 GUARANTEE, dated as of December 1, 1938, by UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as "Realty"), to GUARANTY TRUST COMPANY OF NEW YORK (a corporation organized and existing under the Banking Law of the State of New York, hereinafter referred to as the "Mortgagee"), as Mortgagee under the First Mortgage Five and One-Half Per Cent Sinking Fund Gold Loan, dated June 1, 1919, of Trinity Buildings Corporation of New York.

179 WHEREAS, an Arrangement (known as the "Amended Modification Plan and Arrangement of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, and Guarantee thereof", dated May 1, 1939) for Realty under Chapter XI of the Bankruptcy Act has been confirmed by an Order of the United States District Court for the Southern District of New York, dated , 1939, in proceedings entitled "In the Matter of United States Realty and Improvement Company, Debtor, No. "; and

180 WHEREAS, such Arrangement concerned the modification and extension of a Guarantee by Realty of the aforesaid First Mortgage Loan of Trinity Buildings Corporation of New York; and

WHEREAS, such Arrangement provided:

"In the event the Arrangement under Chapter XI is confirmed, Realty shall unconditionally guarantee the due and punctual payment by Trinity, or the New Com-

Debtor's Petition for Arrangement: Exhibit B.

pany, as the case may be, of *principal* and *interest* on the Bond and Mortgage as modified hereunder or on the New Bonds, as the case may be. The obligation of Realty as modified by the Arrangement shall be a Guarantee of principal with a maturity of July 1, 1949 and of fixed and additional interest as herein described. *The Guarantee of Realty shall be unconditionally and irrevocably modified in the event the Arrangement under Chapter XI of the Bankruptcy Act is confirmed*, regardless whether or not (a) the Burchill Act proceeding is instituted, (b) the Plan of Reorganization thereunder is approved by the Court, or (c) such Plan is consummated."

and

WHEREAS, the aforesaid Court has approved the form of this Guarantee and has directed its execution by an Order dated , 1939;

NOW, THEREFORE, in consideration of the premises, Realty for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, as Mortgagee aforesaid; its successors and assigns, and to the holders and registered owners from time to time of certificates for shares in the aforesaid First Mortgage Loan, the due and punctual payment by ~~Trinity~~ Buildings Corporation of New York of (a) the principal of such Loan with a maturity of July 1, 1949 as and when the same shall become due and payable whether at such maturity or by declaration under the terms of the obligation as modified under the aforesaid Amended Modification Plan and Arrangement; (b) interest on such First Mortgage Loan at the rate of 3% per annum commencing December 1, 1938 and payable on July 1, 1939 and

Debtor's Petition for Arrangement: Exhibit B.

184 semi-annually thereafter; (c) additional interest in an amount equivalent to the sum of 1% per annum for the period December 1, 1938 until July 1, 1944 and of 2% per annum for the period July 1, 1944 until July 1, 1949 of outstanding certificates for shares and payable on July 1, 1949 to the extent not theretofore paid.

No delay or omission by the Mortgagee, its successors and assigns, or of the holders or registered owners for the time being of said certificates for shares to exercise any right, power or privilege consequent upon any default and no waiver of any default or its consequences shall in any wise affect or discharge the unconditional liability or responsibility of Realty upon its Guarantee as hereinabove set forth.

185 Any or all the terms of this Guarantee, including without limitation extension of the maturity or reduction of interest rate, may, from time to time, be modified upon the written consent delivered to the Mortgagee of holders of not less than 66⅔% in principal amount of certificates for shares then outstanding and upon the written consent of Realty; provided, however, that written dissents to such modification or modifications shall not have been received from holders of 20% or more in principal amount of the certificates for shares then outstanding. Outstanding certificates for shares held by Realty or Trinity Buildings Corporation of New York or any subsidiary of either shall not be so voted and shall not be included in the determination of outstanding certificates for shares. In the event the aforesaid Amended Modification Plan and Arrangement is consummated as a Plan of Reorganization for Trinity Buildings Corporation of New York under the New York State Burchill Act, this provision shall be binding upon the Trustee under the New Indenture and

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Debtor's Petition for Arrangement: Exhibit B.

upon the holders of New Bonds described in the aforesaid Amended Modification Plan and Arrangement.

Realty does hereby expressly covenant that in the event the aforesaid Amended Modification Plan and Arrangement is consummated as a Plan of Reorganization for Trinity Buildings Corporation of New York under the New York State Burchill Act this Guarantee shall run to the Trustee under the New Indenture and to holders of New Bonds described in the aforesaid Amended Modification Plan and Arrangement.

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IN WITNESS WHEREOF, United States Realty and Improvement Company has caused these presents to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed and duly attested as of the day and year aforesaid.

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UNITED STATES REALTY AND IMPROVEMENT COMPANY

By

President

ATTEST:

Secretary

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

On the day of , 1939, before me came EDWIN J. BEINECKE, to me known, who, being by me duly sworn, did depose and say that he resides at 812 Park Avenue, New York, N. Y.; that he is President of UNITED STATES REALTY AND IMPROVEMENT COMPANY, the corporation described in and which executed the foregoing instrument: that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

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Debtor's Petition for Arrangement.

Exhibit C.


(See Opposite)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER
OF
UNITED STATES REALTY
AND IMPROVEMENT COMPANY,
Debtor.

In proceedings under
Chapter XI of the
Bankruptcy Act

STATE OF
COUNTY OF } ss.:  Fill in name of State and County

The undersigned, being duly sworn, deposes and says, that he is

Cross out
paragraphs
not applicable

(1) a holder (for individuals)
(2) a member of the firm of which is a holder (for partnerships) (Print name of partnership)
(3) (Print officer's title) of (Print name of corporation) a corporation carrying on business in the county and state first above (Print state of incorporation) mentioned, which is a holder (for corporations)

of the below described Share Certificates in the First Mortgage Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan, due June 1, 1939, of Trinity Buildings Corporation of New York, and that he is duly authorized to make this proof of claim and give this acceptance.

This claim is founded upon a guarantee executed and delivered by the Debtor as of June 1, 1919 (a true copy of which is printed on the reverse hereof) to Guaranty Trust Company of New York, as Mortgagee, and Claimant is the owner of the following Share Certificates with coupons dated June 1, 1939 attached:

SHARE CERTIFICATES HELD BY THE UNDERSIGNED
(List each certificate separately)

Certificate Numbers

Principal Amount

FILL IN 

.....	\$
.....
.....

Total \$

The consideration for the debt (namely, the guarantee) is the purchase of the aforesaid certificates from the Debtor. The Debtor is justly and truly indebted to Claimant as of the date of the filing of its petition in the aforesaid amount with interest thereon from December 1, 1938 and there are no set-offs or counter-claims thereto and no judgment has been rendered thereon nor have any payments been made by the Debtor thereon.

Claimant holds no security for said debt (namely, the guarantee) but as security for the primary obligation represented by said Share Certificates, Claimant is entitled to a share in a Bond and Mortgage of Trinity Buildings Corporation of New York held by Guaranty Trust Company of New York, as Mortgagee.

Claimant hereby severally accepts the Amended Modification Plan and Arrangement, dated May 1, 1939 (the receipt of a copy of which is hereby acknowledged) as (a) an Arrangement pursuant to Chapter XI of the Bankruptcy Act with respect to the obligation of the Debtor on its aforesaid guarantee, and separately and independently as (b) a Plan of Reorganization under the New York State Burchill Act with respect to the obligation of Trinity Buildings Corporation of New York on the aforesaid Loan and the Share Certificates therein.

This acceptance in so far as it concerns the modification of the obligation of the Debtor under its guarantee is not a confirmation or consummation of the plan or any proceeding with respect to the obligation of

obtained as to the Arrangement is revocable in writing at any time prior to the confirmation thereof by the organization under the Burchill Act is revocable in writing at any time prior to the determination thereof by

SHARE CERTIFICATES HELD BY THE UNDERSIGNED

(List each certificate separately)

Certificate Numbers

Principal Amount

FILL IN

Total \$.....

The consideration for the debt (namely, the guarantee) is the purchase of the aforesaid certificates from the Debtor. The Debtor is justly and truly indebted to Claimant as of the date of the filing of its petition in the aforesaid amount with interest thereon from December 1, 1938 and there are no set-offs or counter-claims thereto and no judgment has been rendered thereon nor have any payments been made by the Debtor thereon.

Claimant holds no security for said debt (namely, the guarantee) but as security for the primary obligation represented by said Share Certificates, Claimant is entitled to a share in a Bond and Mortgage of Trinity Buildings Corporation of New York held by Guaranty Trust Company of New York, as Mortgagee.

Claimant hereby severally accepts the Amended Modification Plan and Arrangement, dated May 1, 1939 (the receipt of a copy of which is hereby acknowledged) as (a) an Arrangement pursuant to Chapter XI of the Bankruptcy Act with respect to the obligation of the Debtor on its aforesaid guarantee, and separately and independently as (b) a Plan of Reorganization under the New York State Burchill Act with respect to the obligation of Trinity Buildings Corporation of New York on the aforesaid Loan and the Share Certificates therein.

This acceptance, in so far as it concerns the modification of the obligation of the Debtor under its guarantee is not conditioned on the institution, confirmation or consummation of the plan or any proceeding with respect to the obligation of Trinity Buildings Corporation of New York.

Claimant hereby authorizes and directs Trinity Buildings Corporation of New York to which this acceptance and proof of claim is delivered to file the same at or before the first meeting of creditors in the proceedings under Chapter XI of the Bankruptcy Act.

Claimant hereby authorizes and directs Guaranty Trust Company of New York, as Mortgagee, to institute and prosecute (after and not before the confirmation of the Arrangement) a foreclosure proceeding under the Burchill Act, to present the Modification Plan and Arrangement to the New York State Court with its petition for foreclosure under such Act, and to recite in such petition the number and amount of acceptances received by Trinity. Furthermore, Guaranty Trust Company of New York, as Mortgagee, and Trinity Buildings Corporation of New York are severally authorized and directed, if necessary, to present to the Court in the Burchill Act proceeding a certified copy of this acceptance, if on file as a proof of claim in the Arrangement proceedings, or to present to such Court this acceptance if not so on file and to take any and all action deemed necessary or advisable in connection with the confirmation, effectuation and consummation of the Modification Plan and Arrangement.

Guaranty Trust Company of New York, as Mortgagee, is also authorized and directed in its petition for foreclosure under the Burchill Act to request the Court that no receiver of the mortgaged premises or the rents therefrom be appointed.

Guaranty Trust Company of New York, as Mortgagee, is also authorized and directed to bid at the foreclosure sale of the mortgaged premises under the Burchill Act the maximum amount set forth in the Modification Plan and Arrangement or such other maximum amount as may be fixed by the Court for the purchase of such premises.

Subscribed and sworn to before me

(Name of certificate holder)

this day of, 1939.

(Name of partner or officer of corporation, if any)

(Notary public or other officer authorized to take verifications)

(Address)

[Notarial Seal]

(Please print here name of above signature)

Be certain that name of state and county are filled in at the top of this Acceptance.

The following is a true copy of the Guarantee held by Guaranty Trust Company of New York as Mortgagee for the benefit of the holders of the outstanding certificates:

UNITED STATES REALTY AND IMPROVEMENT COMPANY GUARANTEE

Know All Men by these Presents, That

WHEREAS, Trinity Buildings Corporation of New York has executed and delivered to Guaranty Trust Company of New York, its certain bond for its First Mortgage Twenty-Year Five and One-Half Per Cent. Gold Loan in the principal sum of seven million dollars (\$7,000,000), dated June 1, 1919, and payable on the first day of June, 1939, with interest at the rate of five and one-half per cent. per annum, and has executed and delivered to said Trust Company, to secure the payment of said bond, a mortgage upon the premises and buildings known as the Trinity Building and the United States Realty Building in the City of New York; and

WHEREAS, the said Trust Company as the holder of said bond and mortgage has issued a series of certificates representing pro rata shares in said bond and mortgage in the aggregate principal sum of seven million dollars (\$7,000,000); and

WHEREAS, the undersigned United States Realty and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the "Realty Company", has purchased the entire issue of said certificates, and intends to re-sell the same, and, as a condition of such resale, and in order to induce the purchasers to accept and pay for said certificates, has agreed to guarantee unconditionally the said bond and mortgage and said Trinity Buildings Corporation of New York.

NOW, THEREFORE, in consideration of the premises, and FOR VALUE RECEIVED, United States Realty and Improvement Company, for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, its successors and assigns, and to the holders and registered owners from time to time of the said certificates for shares in said bond and mortgage, the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its said bond and mortgage, dated June 1, 1919, as and when the same shall become due and payable whether at maturity or by declaration or otherwise, and of the sinking fund payments and other sums and charges therein required to be paid by it, and as well the due performance and observance by said Trinity Buildings Corporation of New York of all the terms, conditions and covenants in said bond and mortgage contained on its part to be performed and observed; all demands and notice or notices of default or defaults being hereby waived.

AND IT IS HEREBY FURTHER COVENANTED, STIPULATED AND AGREED, that in the event of default by said Trinity Buildings Corporation of New York under the terms of said bond and mortgage, and as often as any such default shall occur, no delay or omission by said Guaranty Trust Company of New York, its successors and assigns, or of the holders and registered owners for the time being of said certificates, to exercise any right, power or privilege consequent upon any such default, and no waiver of any such default or its consequences shall in any wise affect or discharge the unconditional liability and responsibility of the undersigned Realty Company upon this guarantee.

IN WITNESS WHEREOF, the undersigned Realty Company has caused these presents to be executed by its proper officers thereunto duly authorized, and its corporate seal to be hereunto affixed and duly attested, as of the first day of June, 1919.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

By PAUL STARRETT,
President

*Debtor's Petition for Arrangement.***Exhibits D and E.****SCHEDULES REQUIRED BY SECTION 324
OF THE BANKRUPTCY ACT**

196 **Note:** The following schedules set forth the liabilities and assets of the Debtor on the accrual basis inasmuch as the proceedings herein are for an Arrangement under Chapter XI and inasmuch as it is impracticable to set them forth on a cash basis. The proceedings instituted herein are for an Arrangement respecting the modification and extension of only one obligation of the Debtor and therefore, on information and belief, the schedules attached are sufficient compliance with the Bankruptcy Act.

197 In all instances in the Schedules relating to assets of the Debtor the values given are the book values which do not purport to represent present market or realizable values.

Inasmuch as the books of the Debtor are maintained on a month to month basis, all of the figures contained in the following schedules of liabilities and assets are set forth as of April 30, 1939.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,
PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (1)****STATEMENT OF ALL DEBTS OF DEBTOR**

Statement of all creditors who are to be paid in full or to whom priority is secured by law.

**CLAIMS
WHICH HAVE
PRIORITY**

AMOUNT
Dollars Cents

1. Taxes and debts due and owing the United States	Tax withheld on Coupons paid to Non-resident aliens	39 75	199
	Tax withheld at source	1080 90	
	Federal Unemployment Taxes	68 61	
	Federal Old-Age Pension Tax	48 21	200
	Federal Capital Stock Tax (Approx. \$960. due July 1939)	800 00 Acr'd	
2. Taxes due and owing to the State of New York	New York State Unemployment Tax	73 66	
or to any County, Dis- trict or Municipality thereof	City of New York Sales Tax	09	
Taxes due and owing to the State of New Jersey	New Jersey State Franchise Tax (\$3075. due August 1939) Accrued	1025 00	201

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (1) (CONT'D)**

3.
 202 Wages due
 workmen,
 Clerks or
 Servants, to
 an amount not
 exceeding \$600
 each, earned
 within
 three months
 before filing
 the petition

None

4.
 203 Other debts
 having
 priority
 by law

None

Total \$3,136.22

**UNITED STATES REALTY AND
 IMPROVEMENT COMPANY, PETITIONER**

By **FREDERICK M. SANDERS**
 Executive Vice-President

SCHEDULE A. (2)

204 **CREDITORS HOLDING SECURITIES**

(N.B.—Particulars of Securities held, with dates of same, and when they were given to be stated under the names of the several Creditors, and also particulars concerning each Debt, as required by the Acts of Congress relating to Bankruptcy, whether contracted as partner or joint-contractor with any other person; and if so, with whom.)

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (2) (CONT'D)**

	VALUE OF SECURITIES		AMOUNT OF DEBTS		
	Dollars	Cents	Dollars	Cents	
Manufacturers Trust Company					205
55 Broad Street, New York, N. Y.					
Note Payable, 4%, due \$37,500.00 November 30, 1939 and quarterly thereafter until August 30, 1940 when balance becomes due. (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$137,500.00 Note of Plaza Operating Company, having a book value in the aggregate of \$874,567.00—These securities are also pledged to secure payment by Plaza Operating Company to Manufacturers Trust Company of any amounts borrowed from time to time. At April 30, 1939 Plaza Operating Company owed Manufacturers Trust Company \$100,000.00 on note due \$25,000.00 on May 30, 1939 and \$25,000.00 monthly thereafter.)			\$137,500.00		206
Interest thereon to April 30, 1939			45.84		
National City Bank of New York,					207
55 Wall Street, New York, N. Y.					
Note Payable, 4%, due August 12, 1939. (Secured by pledge of \$4,000,000. Bond and Mortgage covering Whitehall Building and the premises 20-26 Washington Street and 15-17 West Street, New York, N. Y.)			3,000,000.00		
Interest thereon to April 30, 1939			1,333.34		

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE A. (2) (CONT'D)

208	Various holders of G. A. F. Realty Corporation 6% Debentures due January 1, 1944 (Guaranteed by United States Realty and Improvement Company). Bearer—names of owners not known.	VALUE OF SECURITIES	AMOUNT OF DEBTS
		Dollars Cents	Dollars Cents
			\$1,204,500.00
	Interest thereon to April 30, 1939		24,090.00
209	The G. A. F. Realty Corp. was reorganized under Section 77-B of the Bankruptcy Act. The plan of reorganization was consummated on Jan. 31, 1936. Under the plan the G. A. F. Realty Corp. was discharged from liability as to these debentures and the holders thereof were relegated to the guarantees of the United States Realty and Improvement Co. in respect thereto. Under the plan the holders of such debentures were given the opportunity of exchanging same, par for par, for the debentures of the United States Realty and Improvement Co., similar in terms to the existing guarantees of the United States Realty and Improvement Co. of the payment of sinking fund, interest and principal at maturity of said debentures of the G. A. F. Realty Corp.		
210			
	Various holders of United States Realty and Improvement Company 6% Debentures due Jan. 1, 1944. Bearer—names of owners not known.		1,139,500.00
	(Issued in exchange for G. A. F. Realty Corp. 6% Debentures due Jan. 1, 1944—Guaranteed by United States Realty and Improvement Co.)		

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (2) (CONT'D)**

VALUE OF SECURITIES		AMOUNT OF DEBTS	
Dollars	Cents	Dollars	Cents

Interest thereon to April 30, 1939

22,790.00

Voting Trust certificates representing 8,576 shares of Class "B" Common Stock of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for its guarantees of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation Fifteen-Year Sinking Fund 6% Gold Debentures and for the payment of interest, sinking fund and principal at maturity of the 6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company, subject to an agreement to surrender such stock to Fuller Building Corporation in the eventuality of a lack of certain earnings by that corporation.

TOTAL**\$5,529,759.18**

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONERBy **FREDERICK M. SANDERS****Executive Vice-President**

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (3)****CREDITORS WHOSE CLAIMS ARE UNSECURED**

		AMOUNT	
		Dollars	Cents
4	F. S. Webster Company, 1-23 Amherst St., Kendall Sq., Mass.	\$	40.80
	Union Card & Paper Company, 45 Beekman Street, New York, N. Y.		4.72
5	Bainbridge, Kimpton & Haupt, Inc., 218 Greenwich St., New York, N. Y.		5.08
	Colonial Typewriter Co., 92 Liberty St., New York, N. Y.		3.00
6	John C. Paige & Company, Inc., 111 Broadway, New York, N. Y.		16.76
	Underwood Elliott Fisher Co., 1 Park Avenue, New York, N. Y.		1.50
16	Arthur Anderson & Company, 67 Wall Street, New York, N. Y.		3,500.00
	Various unknown holders of stock scrip certificates		163.50
	The New York Trust Company, 100 Broadway, New York, N. Y.		2,354.29
	Total	\$6,089.65	

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By FREDERICK M. SANDERS

Debtor's Petition for Arrangement: Exhibits D and E.

✓ SCHEDULE A. (4)

**LIABILITIES ON NOTES OR BILLS DISCOUNTED, WHICH
OUGHT TO BE PAID BY THE DRAWERS, MAKERS, AC-
CEPTORS OR ENDORSERS**

217

(N.B.—The dates of the Notes or Bills, and when due, with the Names, Residences, and the Business or Occupation of the Drawers, Makers or Acceptors thereof are to be set forth under the Names of the holders. If the Names of the Holders are not known, the Name of the last Holder known to the Debtor shall be stated and his business and place of residence. The same particulars as to Notes or Bills on which the Debtor is liable as Endorser.)

AMOUNT

218

Dollars Cents

NONE

TOTAL

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

SCHEDULE A. (5)

ACCOMMODATION PAPER

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(N. B.—The dates of the Notes or Bills, and when due, with the Names and Residences, of the Drawers, Makers and acceptors thereof, are to be set forth under the Names of the holders; if the bankrupt be liable as Drawer, Maker, Acceptor or Endorser thereof; it is to be stated accordingly. If the names of the Holders are not known, the Name of the last

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (5) (Cont'd.)**

Holder known to the Debtor should be stated, with his residence. The same particulars as to other commercial paper.)

AMOUNT

Dollars Cents

None

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

SCHEDULE A. (6)

**CREDITORS WHO ASSERT CONTINGENT, UNLIQUIDATED,
OR DISPUTED CLAIMS.**

AMOUNT

Dollars Cents

Contingent liability on Guarantee executed and delivered to Manufacturers Trust Company, 55 Broad Street, New York, N. Y., dated April 28, 1939, of a note of Plaza Operating Company in the amount of \$100,000.00 and bearing interest at the rate of 4% per annum. This note is payable \$25,000.00 on May 30, 1939, and \$25,000.00 on the 30th of each month thereafter. Petitioner is contingently liable with respect to this obligation. This guarantee and a note of Petitioner to Manufacturers Trust Company are secured by the pledge of certain securities as hereinabove set forth.

Principal Amount

\$100,000.00

Interest thereon to April 30, 1939

33.33

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (6) (CONT'D)**

	AMOUNT	
	Dollars	Cents
Contingent liability on Guarantee dated June 1, 1919, executed and delivered to Guaranty Trust Company of New York, as Mortgagee, 140 Broadway, New York, N. Y., and guaranteeing the First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan due June 1, 1939, of Trinity Buildings Corporation of New York. The Petitioner is contingently liable with respect to such obligation and it is the obligation under this guarantee alone which is the subject of the Arrangement submitted herewith.		22
Principal Amount	3,710,500.00	22
Accrued interest to April 30, 1939	85,032.29	
Contingent liability on Endorsement of note of Trinity Buildings Corporation of New York, dated April 28, 1939, and due May 15, 1939, in the principal amount of \$15,000.00 discounted at 4% by Manufacturers Trust Company, 55 Broad Street, New York, N. Y., upon which note Petitioner is contingently liable.		
Principal Amount.	15,000.00	22

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (6) (CONT'D)**

	AMOUNT	
	Dollars	Cents
Proposed deficiency in Federal income taxes for 1933 which is being contested.		

Possible liability for intangible personal property taxes to City of Jersey City for the years 1937, 1938 and 1939 in an indeterminate amount.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,
PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

[Verification to Schedule A]

SCHEDULE B. (1)**STATEMENT OF ALL PROPERTY OF BANKRUPT REAL ESTATE**

	BOOK VALUE	
	Dollars	Cents
ALL that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:		

BEGINNING at a point on the northerly side of Thames Street, distant 34 feet 10½ inches westerly from the west-

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

BOOK VALUE		
Dollars	Cents	
		22

erly side of Trinity Place, at the easterly face of the easterly wall of the building on the premises herein described and adjoining the land of St. Peter's School, and running thence **NORTHERLY**, along the easterly face of said wall and the land of St. Peter's School, 32 feet 4 inches to other lands of St. Peter's School; thence **WESTERLY**, along the same, to and along the southerly face of the building adjoining on the northerly side, 33 feet 2 inches to other lands of St. Peter's School at a point opposite the westerly face of the westerly wall of the building on the premises herein described; thence **SOUTHERLY** to and along the same, 32 feet 4 inches to the northerly side of Thames Street and thence **EAST-ERLY**, along the same 33 feet 2 inches to the point or place of beginning.

23

SAID PREMISES being now or lately known as and by the Street Numbers 15 and 15½ Thames Street.

\$62,551.65.

ALL that certain lot, piece or parcel of land, with the buildings thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

23

BEGINNING at the corner formed by the intersection of the northerly side of East 49th Street and the westerly side of First Avenue; running thence **Westerly**, along the northerly side of East 49th Street, 225 feet; running thence **Northerly**, parallel with First Avenue, 100 feet 5 inches to the center line of the block between 49th and 50th

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**BOOK VALUE
Dollars Cents

232

Streets; running thence Easterly, along said center line of the block, 225 feet to the westerly side of First Avenue; running thence Southerly, along the westerly side of First Avenue, 100 feet 5 inches to the point or place of beginning.

TOGETHER WITH any and all strips or gores of land adjoining said property owned by the Newplan Holding Corporation.

233

Said premises now being known as and by the Street numbers 341 to 359 East 49th t and 883 to 891 First Avenue.

TOGETHER WITH any and all buildings, structures, improvements and fixtures and articles of personal property used in the operation of said premises.

\$613,362.

234

ALL that plot of land in the Village of White Plains, County of Westchester and State of New York, known and designated as lots Numbers Twenty-One, Twenty-Two, Forty-Six and Forty-Seven on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, property of Joshua M. Sprague, June, 1902", made by Byrne & Darling, Civil Engineers and Surveyors, White Plains, New York, filed in the office of the Register of the County of Westchester on June 16, 1902, in Volume 14 of Maps, page 73, being more particularly bounded and described as follows:— BEGINNING at a point of intersection of the northerly side of Livingston Avenue and the easterly side of Mamaroneck Avenue; thence northerly

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**BOOK VA
Dollars C

along the easterly side of Mamaroneck Avenue on a curve to the right with a radius of four hundred and eleven and seventy-two one-hundredths feet a distance of twenty-five and thirty-five one-hundredths feet to a point; thence north nine degrees, twenty-five minutes, thirty seconds west still along the easterly side of Mamaroneck Avenue a distance of seventy-four and sixty-six one-hundredths feet to the division line between lot Number Twenty and lot Number Twenty-One on the aforesaid map; thence north

eighty degrees, thirty-four minutes thirty seconds east along said last division line and the division line between lot Number Forty-Five and lot Number Forty-Six a distance of two hundred and sixty feet to the westerly side of Waller Avenue; thence south nine degrees, twenty-five minutes, thirty seconds east along the westerly side of Waller Avenue a distance of one hundred feet to the northerly side of Livingston Avenue; thence south eighty degrees, thirty-four minutes, thirty seconds west along the northerly side of Livingston Avenue a distance of two hundred and fifty-nine and twenty-two one-hundredths feet to the point or place of beginning.

\$125,46

ALL that certain plot, piece or parcel of land in the City of White Plains, County of Westchester and State

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (1) (CONT'D)

BOOK VALUE
Dollars Cents

238

of New York, designated as Lots Numbers 15 and 16 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, New York, property of Joshua M. Sprague" made by Byrne & Darling, Civil Engineers and Surveyors, White Plains, New York, dated June, 1902 and filed in the office of the Register of Westchester County, June 16, 1902 in Volume 14, page 73 of maps.

239

Together with all the right, title and interest of the parties of the first part, of, in and to the highway in front of and adjacent to said premises to the center line thereof.

Being the same premises conveyed to the parties of the first part by deed of Frederick R. Reed and Helen W. Reed, his wife, recorded in Liber 2930 of Deeds, Page 401, in the Westchester County Register's office.

Said premises herein conveyed being further bounded and described as follows:

All those two lots of land in the City of White Plains, County of Westchester and State of New York, designated as Lots Nos. 15 and 16 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, New York, property of Joshua M. Sprague" made by Byrne and Darling, Civil Engineers and Surveyors, White

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

BOOK VALUE
Dollars Cents

Plains, New York, dated June 1902 and filed in the office of the Register of Westchester County June 16, 1902, being bounded and described with reference to said map as follows:

BEGINNING at a point on the easterly side of Mamaroneck Avenue where the same is intersected by the dividing line between lots 14 and 15; running thence North 80 degrees 34' 30" east along said dividing line 135 feet to lot number 40; running thence South 9 degrees 25' 30" east along lots 40 and 41, 100 feet to lot number 17; running thence South 80 degrees 34' 30" west along the dividing line between lots 17 and 16, 135 feet to the easterly line of Mamaroneck Avenue; running thence North 9 degrees 25' 30" west along the easterly line of Mamaroneck Avenue 100 feet to the point or place of beginning.

\$96,357.79

ALL that lot of land, together with the building thereon, situate, lying and being in the City of White Plains, County of Westchester and State of New York, being known and designated as Lot Number 17 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester Co. N. Y. property of Joshua M. Sprague", made by Byrne and Darling, Civil Engineers, dated June 1902 and filed in the Office of the Register of Westchester County June 16, 1902 in Volume 14 of Maps at page 73, and bounded and described as follows:

BEGINNING at a point on the easterly side of Mamaroneck Avenue distant 250.01 feet northerly as

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)****BOOK VALUE****Dollars Cents**

244 measured along the said easterly side of Mamaroneck Avenue from the corner formed by the intersection of the northerly side of Livingston Avenue with the easterly side of Mamaroneck Avenue; running thence along the northerly side of lot 18 as on said Map North 80 degrees 34' 30" East 135 feet to the westerly side of lot 42 as on said Map; running thence along the westerly side of said lot No. 42 North 9 degrees 25' 30" West 50 feet to the southerly side of Lot No. 16 as on said map; running thence along the southerly side of said lot No. 16 South 80 degrees 34' 30" West 135 feet to the easterly side of Mamaroneck Avenue; running thence along the said easterly side of Mamaroneck Avenue South 9 degrees 25' 30" East 50 feet to the point or place of beginning.

245 **TOGETHER** with all the right, title and interest of the party of the first part hereto, of, in and to the highway bounding the foregoing described premises in front to the center line thereof.

SUBJECT to covenants and restrictions of record inso-

246 far as the same affect the foregoing described premises.

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

	BOOK VALUE		247
	Dollars	Cents	
SUBJECT to Zoning Regulations and Building Restrictions of the City of White Plains, New York, adopted by its Common Council.	\$53,025.32		
TOTAL	\$950,765.20		

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President 248

SCHEDULE B. (2).**PERSONAL PROPERTY**

	AMOUNT		249
	Dollars	Cents	
a) Cash on Hand (petty cash account)	\$5,000.00		
Postage stamps	198.07		
TOTAL	\$ 5,198.07		
a) (1) Cash for refund of taxes on deposit with National City Bank of New York	\$97.12		
Sinking Fund deposit with National City Bank, Trustee	60.14		
Stock—Bond—Scrip	8.50		
TOTAL	\$ 165.76		

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (2) (CONT'D)

		AMOUNT	
		Dollars	Cents
50	(d) Office furniture and equipment (book value)	\$1,458.18	
	TOTAL	\$	1,458.18
	(b) MORTGAGES RECEIVABLE	BOOK VALUE	
		Dollars	Cents
	York Avenue and 85th St.—2nd Mtg.		
	6% Past due		
	Cost \$161,937.50 carried at	\$	1.00
	Breslin Hotel, B'way & 29th St. 1st Mtge.		
	3% from June 1, 1938 to May 31, 1942		
	4% from June 1, 1942 to May 31, 1957		
	Amortization payments as follows:		
	\$ 416.66 per Mo. from 7-1-38 to 6-1-39		
	2,500.00 per Mo. from 7-1-39 to 6-1-40		
	416.66 per Mo. from 7-1-40 to 6-1-57		
	when balance becomes due	520,833.40	
	Interest thereon to April 30, 1939	1,302.08	
	337-39 E. 49th St. 1st Mtge.		
	3½% from Mar. 1, 1938 to Mar. 1, 1940		
	4% from Mar. 1, 1940 to Mar. 1, 1943		
	Amortization payments of \$85.00 due		
	on June 1, 1939 and quarterly there-		
	after until Mar. 1, 1943 when balance		
	becomes due	34,000.00	
	Interest thereon to April 30, 1939	198.33	
	Whitehall Building,		
	17 Battery Place, New York, N. Y.		
	1st Mortgage—due 90 days after notice		
	and demand thereof	4,000.00	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (2) (CONT'D)**

	BOOK VALUE		253
	Dollars	Cents	
Interest at 6% Payable quarterly March, June, September and December 20th (pledged to secure \$3,000,000 Note of Petitioner to The National City Bank of New York as set forth on Schedule A-2 filed herewith)			
Interest thereon to April 30, 1939	\$	27,333.33	
NOTES RECEIVABLE:			
Trinity Buildings Corporation of New York, 111 Broadway, New York, N. Y. due June 1, 1939		8,781,192.44	254
Whitehall Improvement Corporation, 111 Broadway, New York, N. Y. Due June 30, 1939, Interest @ 2% payable monthly		3,675,945.59	
Interest thereon to April 30, 1939		6,126.58	
Lawyers Building Corporation, 10 State Street, Boston, Mass. Due on demand		1,274,059.46	
Plaza Operating Company, 111 Broadway, New York, N. Y. Due August 30, 1940 Interest @ 4% payable May 30, 1939 and quarterly thereafter		137,500.00	255
Interest thereon to April 30, 1939		45.84	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (2) (CONT'D)**

BOOK VALUE

Dollars Cents

(This note is pledged to secure Note payable of Petitioner in like amount to Manufacturers Trust Company)

Plaza Operating Company,
111 Broadway, New York, N. Y.

Due on demand and it is subordinated to all indebtedness of Plaza Operating Company to Manufacturers Trust Company, and subject to an agreement with Manufacturers Trust Company as to demand. (Principal Amount \$3,930,000.00)

—0—

TOTAL **\$18,458,538.05**

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

SCHEDULE B. (3)**CHOSES IN ACTION**

Description and Amount	PRINCIPAL AMOUNT	
	Dollars	Cents
Trinity Buildings Corporation of New York.		
111 Broadway, New York, N. Y.	1,661,760	87
Lawyers Building Corporation, 10 State Street, Boston, Mass.	25,000	00
M. Harris, 15-15½ Thames Street, New York.		

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (3) (CONTD)

Pix Theatres, Inc., White Plains, New York	62 50	259
Scharlin Sales Corporation, 405 East 32nd Street, New York, N. Y.	100 00	
Onarwa Realty Corporation, 25 Broad Street, New York, N. Y.	1,450 00	
Usall Realty Corporation, .25 Broad Street, New York, N. Y. \$432,864.43	—	260
Beaux-Arts Apartments, 310 East 44th Street, New York, N. Y.	2 46	
A. T. Black, 597 Madison Avenue, New York, N. Y.	1 05	
Copley-Plaza Operating Company, Boston, Mass.	13 51	
A. J. Flohr, 111 Broadway, New York, N. Y.	1 05	261
George A. Fuller Company, 597 Madison Avenue, New York, N. Y.	9 73	
Michael Harris, 15-15½ Thames Street, New York, N. Y.	15 86	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)****PRINCIPAL AMOUNT**
Dollars Cents**Hotel Breslin, Inc.****Broadway & 29th Street, New York,
N. Y.****3,929 50****Taxes paid for in advance in pursu-
ance to mortgage.****Lawyers Club,****115 Broadway, New York, N. Y.****102 17****George W. Martin,****111 Broadway, New York, N. Y.****90****BOOK VALUE****Description and Amount****Dollars Cents****Trinity Buildings Corporation
of New York,****111 Broadway, New York, N. Y.****1,000 shares Capital Stock, without
par value, stated at****1,000,000.00****Whitehall Improvement Corporation,****111 Broadway, New York, N. Y.****5 shares Capital Stock, par value****\$100.00 per share.****500.00****Lawyers Building Corporation,****10 State Street, Boston, Mass.****100 shares Capital Stock, par value****\$100.00 per share.****10,000.00**

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

	BOOK VALUE		
	Dollars	Cents	
G. A. F. Realty Corporation (inactive) 111 Broadway, New York, N. Y. 5 shares Capital Stock, par value \$100.00 per share		500.00	265
George A. Fuller Company, 597 Madison Avenue, New York, N. Y. 7786 shares of 4% Cumulative Preferred Stock par value \$100.00 each		778,600.00	266
7893 shares Common Stock, par value \$1.00 each (of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are pledged to secure Note payable of Petitioner to Manufacturers Trust Company for \$137,500)		7,893.00	
Plaza Operating Company, 111 Broadway, New York, N. Y. 25,000 shares Preferred Stock,) Par Value \$100.00 each) 34,483 shares Common Stock,) Par Value \$1.00 each)			267
Copley-Plaza Operating Co. 150 shs. Capital Stock Cost \$15,000.00 carried at		1.00	
U. S. R. Management Corp. Capital Stock 5 shares at par		500.00	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

	BOOK VALUE
	Dollars Cents
Van Sweringen Corp. 5,000 shs. No par stock carried at 1/16 quoted market value as at December 31, 1937	312.50

Alliance Realty Co. 3,509 shs. pfd. cost \$350,900.00 carried at 61½ quoted market value as at Dec. 31, 1938	22,808.50
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	PRINCIPAL AMOUNT
Description and Amount	Dollars Cents
Irene McCauley, 111 Broadway, New York, N. Y.	\$3.11
National Hotel of Cuba, 111 Broadway, New York, N. Y.	141.83
Mrs. George M. Pynchon, 111 Broadway, New York, N. Y.	.60
H. B. Roters, 111 Broadway, New York, N. Y.	.65
Royal Eastern Electric Supply Co., 16 West 22nd Street, New York, N. Y.	6.00

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D).**

	PRINCIPAL AMOUNT		271
	Dollars	Cents	
D.G. Scott, 111 Broadway, New York, N. Y.	18.70		
Whitehall Lunch Club, 17 Battery Place, New York, N. Y.	100.00		
Description and Amount	BOOK VALUE		272
	Dollars	Cents	
Alliance Realty Co. 38,649 shs. com. cost \$632,582.70 carried at 1/16 quoted market value as at Dec. 31, 1938	\$	2,415.56	
Onarwa Realty Corp., 3 shs. cap. stock	300.00		
Stevens Hotel Corp. Voting Trust Certificates for 8,730 shs. of com. stock	1.00		
Robert & Minnie K. Kloeppel \$54,000 par value Second Mortgage Bonds carried at cost	48,600.00		273
Interest thereon to April 30, 1939	216.00		
Usall Realty Co. 3 shs. capital stock, carried at	1.00		

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (3) (CONTD)

BOOK VALUE

Dollars Cents

Beaux-Arts Apts. Inc

3,408 shs. 2nd pfd.) Cost \$307,075.00

Beaux-Arts Apts. Inc.

2,235 shs. Common) carried at 1.00

National Hotel of Cuba Corp.

14,156 shs. pfd.) Cost \$1,316,508.00

ditto

57,424 shs. com.) carried at 1.00

1107 Fifth Ave. Corp.

1,512 shs. pfd. \$151,200.00

Less—Reserve 151,200.00

Savoy-Plaza, Inc.:

\$179,000.00 par value income Bonds

and 2,112 shs. \$1.00 par value Class

"A" Common Stock V. T. C. carried

at 27 $\frac{3}{4}$ quoted market value at Dec.

31, 1938 \$49,672.50

27,350 shs. \$1.00 par

value Class "B" Com-

mon Stock V. T. C. car-

ried at 1.00

49,673.50

Fuller Building Corp. Voting Trust

Certificates representing 8,576 shs.

Class "B" Common Stock (Pledged

to secure certain Debentures as set

forth in Schedule A-2 filed herewith)

1.00

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

Description and Amount	Unearned Premiums
Unexpired portion:	
<i>Fire</i>	
Covering 15 and 15½ Thames St., New York, N. Y.	
California Insurance Co. Expires Jan. 24, 1940	6.66
Pearl Assurance Co. July 6, 1939	2.96
Pearl Assurance Co. Aug. 28, 1939	13.20
Covering East 49th St. and First Ave., New York, N. Y.	
Philadelphia Fire and Marine Insurance Co. Feb. 2, 1940	22.82
<i>General Liability</i>	74.78
15 and 15½ Thames St., New York, N. Y.	
Globe Indemnity Insurance Co. April 27, 1940	16.72
White Plains Property Employers Liability Assurance Corp. June 28, 1939	1.10
49th St. and First Ave. Employers Liability Assurance Corp. Dec. 23, 1939	135.28

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (3) (CONT'D)

Unearned
Premiums

280

Plate Glass

49th St. and First Ave.
Hartford Accident and Indemnity Co.
May 14, 1939

.6

Schedule Bond—All officers and em-
ployees

National Surety Corporation
June 7, 1939

46.6

281

Group Life. Equitable Life Assurance
Society of United States Jan. 1, 1940

4811.6

D. Unliqui-
dated. Claims
of every
nature with
their esti-
mated value.

NONE

282

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

E. Deposits
of money in
banking insti-
tution and
elsewhere*

National City Bank, 55 Wall St., N. Y. C.	\$268,045.80	283
Chase National Bank, Pine & Nassau St., New York City.	4,181.78	
Chase National Bank, 115 Broadway, N. Y. C.	5,385.70	
First National Bank, 1 Wall St., N. Y. C.	5,482.20	
Marine Midland Trust Co., 17 Battery Place, New York City	6,321.81	
Central Hanover Trust Co., 70 Broad- way, N. Y. C.	4,631.61	284
Manufacturers Trust Company, 55 Broad Street, New York City	46,610.60	
National City Bank, Dividend Acct., 55 Wall Street, New York City	—	

Properties:

F. Real Estate
taxes paid in
advance.

15-15½ Thames St., New York, N. Y.	\$145.00
East 49th St. and First Ave., New York, N. Y.	1,469.33
White Plains property	323.68

UNITED STATES REALTY AND IMPROVEMENT COMPANY, 285

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

* All bank balances are stated after deduction of
issued checks which have not been presented for pay-
ment.

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (4)**

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, including Property held in Trust for the Debtor, or subject to any Power or Right to Dispose of, or to Charge.

N. B.—A particular description of each interest must be entered. If all or any of the Debtor's Property has been conveyed by Deed or Assignment, or otherwise, for the benefit of Creditors, the date of such Deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the Debtor.

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (4) CONT'D)

GENERAL INTEREST	PARTICULAR DESCRIPTION	SUPPOSED VALUE OF INTEREST	289
Interest Land	None	Dollars Cents	289
Personal Property	None		
Property Money,			
Stocks,			
Bonds,			
Annuities, etc.	None		290
Rights and Easements,			
Fiduciaries			
All Requests	None	AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED	
		Dollars Cents	
Property Conveyed			
Benefit			
Creditors.			
That portion			
Debtor's			
Property has			
been conveyed			
Deed or			
Assignment,			
Otherwise			
benefit of			
Creditors;			
or of			
by Deed,			
or by			
Assignment of			291

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (4) (CONT'D)**

292	GENERAL INTEREST	PARTICULAR DESCRIPTION	AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED
			Dollars Cents
	party to whom con- veyed, amount real- ized therefrom, disposal of same, so far as known to the Debtor.	None	
293	What sum or sums have been paid to Counsel, and to whom, for service ren- dered or to be rendered in this Bankruptcy.	None	

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

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By **FREDERICK M. SANDERS**
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (5)**

A PARTICULAR STATEMENT of the property claimed as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and if any portion of it is Real Estate, its location, description and present use.

295

VALUATION
Dollars Cents

Military
Uniforms,
Arms and
Equipment.

None

296

Property
claimed to
be exempted
by State
laws; its
valuation;
whether real
or personal;
its descrip-
tion, and
present use;
and reference
given to the
Statute of
the State
treating the
exemption.

None

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**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (6)****BOOKS, PAPERS, DEEDS AND WRITINGS
RELATING TO BANKRUPT'S BUSINESS AND
ESTATE.**

The following is a True List of all Books, Papers, Deeds and Writings relating to my Trade, Business, Dealings, Estate and Effects, or any part thereof, which at the date of this Petition, are in my possession or under my custody and control, or which are in the Possession or Custody of any Person in Trust for me, or for my Use, Benefit, or Advantage; and also of all others which may have been heretofore, at any time in my Possession, or under my custody or Control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same:

BOOKS.

Cash Receipts
Cash Disbursements
Voucher Register
General Journal
General Ledger
Interest Receivable Accrual Book
Interest Payable Accrual Book
Miscellaneous Corporate Books

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (6) (CONT'D)

All in the possession of the Company.

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EDS,

PERS,
C.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

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[Verification to Schedule B]

SUMMARY OF DEBTS AND ASSETS

From the Statements of the Bankrupt in Schedules
A and B.

Schedule A

" "

" "

" "

1 (1) Taxes and Debts due United States	\$2,037.47
1 (2) Taxes due States, Counties, Districts & Municipalities	1,098.75
2 Secured Claims	5,529,759.18
3 Unsecured Claims	6,089.65

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SCHEDULE A, TOTAL \$5,538,985.05

*Debtor's Petition for Arrangement: Exhibits D and E.***SUMMARY OF DEBTS AND ASSETS (CONT'D)**

le B	1	Real Estate	\$950,765.20
"	2-a	Cash on hand	5,198.07
"	2-a-1	Cash on deposit for refund of taxes, Sinking Fund, and Stock and Bond Scrips	165.76
"	2-b	Bills, Promissory Notes and Securities and Mortgages Receivable	18,458,538.05
"	2-d	Household Goods, &c. Office Furniture and Equipment at Book Value	1,458.18
"	3-a	Debts due on Open Accounts	1,692,830.49
"	3-b	Stocks, Negotiable Bonds, &c.	1,922,326.06
"	3-c	Policies of Insurance	5,109.58
"	3-e	Deposits of Money in banks and elsewhere	340,659.50
"	3-f	Real Estate Taxes Paid in Advance	1,938.01

SCHEDULE B, TOTAL \$23,378,988.90

The amounts shown in the summary of the schedules with respect to assets hereinabove set forth are book values and do not purport to be market or realizable values. Some of the assets are carried at amounts greatly in excess of the market or realizable values and, undoubtedly, some have values in excess of the amounts at which they are carried.

In addition, the foregoing summary does not contain Schedule A-6 which contains contingent liabilities in excess of \$3,900,000.00, and which includes the liability of the Debtor on its guarantee of the First Mortgage Loan of Trinity Buildings Corporation of New York, which is the subject of the Arrangement proceedings presently instituted.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By **FREDERICK M. SANDERS**

*Debtor's Petition for Arrangement.***Exhibit G.****STATEMENT OF AFFAIRS**

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(Note: ~~Each~~ question should be answered or the failure to answer explained. If the answer is "none", this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition", as used in the following questions, shall mean the petition filed under Section 3b or 4a of Chapter III, Section 322 of Chapter XI, Section 422 of Chapter XII, or Section 622 of Chapter XIII.)

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1. *Nature, location and name of business*

a. What business are you engaged in?

The Company is a holding and operating company owning, operating and managing real and personal property and holding securities of other companies, its principal investments being in companies engaged in the real estate, hotel and building contracting business.

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b. Where, and under what name, do you carry on such business?

111 Broadway, New York, N.Y.

United States Realty and Improvement Company.

Debtor's Petition for Arrangement: Exhibit G.

c. When did you commence such business?

The Company was organized in 1904 and held its first meeting of directors on May 31, 1904.

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?

The Company has never carried on business under any other name and has not carried on business at any other place within the six years immediately preceding the filing of the annexed Petition, except that it has maintained a branch office at 17 Battery Place, New York, N.Y. and up to 1936 another branch office at 597 Madison Avenue, New York, N.Y.

2. *Books and records*

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original Petition herein?

Arthus J. Flohr, Treasurer of the Company.

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original Petition herein?

No detailed audit of the Company's transactions has been made within the last two years but the books of account, records and balance sheets of the Company have been tested, examined, re-

Debtor's Petition for Arrangement: Exhibit G.

viewed and certified to by Arthur Andersen & Company, 67 Wall Street, New York, N.Y., for each of said years.

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- c. In whose possession are your books of account and records.

In the possession of the Company.

3. *Financial Statements*

- a. Have you issued any financial statements within the two years immediately preceding the filing of the original Petition herein.

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The only financial statements which the Company has issued during the last years are consolidated balance sheet of the Company and its subsidiaries (exclusive of Plaza Operating Company) and consolidated income and deficit accounts for each of the years ending December 31, 1937 and December 31, 1938 which have all been sent to stockholders; quarterly statements of earnings have been issued to the press; individual balance sheets and income statements have been filed by the Company in connection with its income and franchise tax returns to the Federal Government and to the State of New York; all financial statements required by the Securities Exchange Act of 1934 have been filed during the past two years and also financial statements required under the Securities Act of 1933 for the registration of 63,000 shares of Capital Stock of the Company were issued and filed in 1937. The fiscal year of the Com-

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Debtor's Petition for Arrangement: Exhibit G.

pany since January 1, 1930 has been the calendar year.

4. Inventories

The property of the Company, consisting principally of real estate and securities is not the subject of an inventory. Tangible personal property consists only of office furniture and equipment of a value of not in excess of \$2,000. and no inventory as such is made thereof.

- a. When was the last inventory of your property taken?
- b. By whom, or under whose supervision, was this inventory taken?
- c. What was the amount, in dollars, of the inventory?
- d. When was the next prior inventory of your property taken?
- e. By whom, or under whose supervision, was this inventory taken?
- f. What was the amount, in dollars, of the inventory?
- g. In whose possession are the records of the two inventories above referred to?

5. Income other than from operation of business

- a. What amount of income, other than from the operation of your business, have you received during each

Debtor's Petition for Arrangement: Exhibit G.

of the two years immediately preceding the filing of the original Petition herein?

The Company collected in settlement of an action for a breach of contract for subway construction, commenced many years ago against the City of New York, the sum of \$12,000 in June 1938.

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6. *Income tax returns*

- a. Where did you file your last Federal and State income tax returns, and for what years.

The last Federal income tax return of the Company was filed on June 15, 1938 at the Custom House, New York, N.Y., Second District of New York for the year 1937. A tentative return for Federal income tax for the year 1938 was filed on March 15, 1939 and the time for filing of the final return has been extended to June 15, 1939.

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The Company does not pay an income tax to the State of New York but pays a New York State franchise tax. The return for New York State franchise tax purposes for the year beginning November 1, 1938 was filed on July 14, 1938. A tentative return for the year beginning November 1, 1939 was filed on May 10, 1939 and the time to file the final return has been extended to July 15, 1939.

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7. *Bank accounts and safe deposit boxes*

- a. What bank accounts have you maintained, alone or together with any other person, and in your own or

Debtor's Petition for Arrangement: Exhibit G.

any other name, within the two years immediately preceding the filing of the original Petition herein?

Since May 29, 1938 the Company has maintained bank accounts in its own name in the following banks in New York City.

National City Bank of New York, 55 Wall St.;
 National City Bank of New York, 55 Wall St.,
 Dividend Account;
 Chase National Bank of the City of New York,
 18 Pine St.;
 Chase National Bank of the City of New York,
 Mercantile Branch, 115 Broadway;
 First National Bank, 2 Wall St.;
 Marine Midland Trust Company, 17 Battery
 Place;
 Central Hanover Bank and Trust Company, 60
 Broadway;
 Manufacturers Trust Company, 55 Broad St.

During such period the Company has not maintained any bank account with any other persons or in any other name.

- b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original Petition herein?

The Company maintains a safe deposit box in Chase Safe Deposit Company, 115 Broadway, New York, N. Y.

*Debtor's Petition for Arrangement: Exhibit G.*8. *Property held in trust*

- a. What property do you hold in trust for any other person?

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None.

9. *Prior bankruptcy or other proceedings; assignments for benefit of creditors*

- a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original Petition herein?

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None.

- b. Was any of your property, at the time of the filing of the original Petition herein, in the hands of a receiver or trustee?

None except as Trustee of Indentures.

- c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original Petition herein?

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None.

10. *Loans repaid*

- a. What repayments of loans have you made during the year immediately preceding the filing of the original Petition herein?

Debtor's Petition for Arrangement: Exhibit G.

During the past year the Company has made the following payments:

\$332,879.68 to the National City Bank of New York in payment of a note;

\$150,600 to Manufacturers Trust Company on account of a note;

\$5,000 to holders of debentures of the Company which became due on February 1, 1938 but which were presented for payment at a later date.

During the year the Company purchased \$12,000 principal amount of its outstanding debentures, due 1944, and of the 6% debentures of G. A. F. Realty Corporation guaranteed by it for a total amount of \$3,685.00. Such debentures are now held in the treasury.

During the year the Company paid, pursuant to the provisions of a sinking fund, \$79,500 on account of its outstanding 6% Debentures, due 1944. Such payment, however, was made by depositing such Debentures which had been purchased in the open market for a lesser amount.

During the year the Company paid, pursuant to the provisions of a sinking fund, \$150,000 on account of the aforesaid 6% Debentures of G. A. F. Realty Corporation guaranteed by it. Such payment was made with Debentures received in exchange for the 6% Debentures of the Company, pursuant to a Plan of Reorganization of G. A. F. Realty Corporation under Section 77B of the

Debtor's Petition for Arrangement: Exhibit G.

Bankruptcy Act consummated in 1936. The bonds used for this payment were exchanged prior to May 1, 1938.

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11. *Transfer of property*

- a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original Petition herein?

63,000 shares of Capital Stock of the Company, formerly held in the treasury, were sold to the public after having been registered under the Securities Act of 1933.

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2,000 shares of Common Stock of George A. Fuller Company were sold to Lou R. Crandall, the President, under an agreement providing for his services in such capacity.

12. *Accounts receivable*

- a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original Petition herein?

None.

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13. *Losses*

- a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the Petition herein?

None.

*Debtor's Petition for Arrangement: Exhibit G.***Withdrawals.**

- a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original Petition herein?

None except certain minor charges on the books of the Company as set forth in Schedule B.(3) of the schedule filed herewith and except salaries paid to officers during the year immediately preceding the filing of the Petition as follows:

Frederick M. Sanders, Executive Vice President, Secretary and Director	\$10,416.67
Arthur J. Flohr, Vice President, Treasurer and Director	\$ 7,250.00
Douglas Grant Scott, Vice President	\$ 1,000.00
Christian R. Burmeister, Comptroller	\$ 958.33

In addition, Directors, who are not officers receiving a salary, received \$25 for each meeting they attended. The amount received by each Director is as follows:

Edwin J. Beinecke	\$175.00
Harry Bronner	200.00
Edward F. Barrett	200.00
Lou R. Crandall	225.00
Clarke C. Dailey	225.00

Debtor's Petition for Arrangement: Exhibit G.

L. Boyd Hatch	200.00
Otto Marx	250.00
John Reis	100.00
Henry C. Von Elm	175.00

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It is to be noted that some of the foregoing officers and certain other officers of the Company received their salaries either in whole or in part from wholly owned subsidiaries of the Company as an operating expense of such subsidiaries.

15. *Members of partnership, officers, directors, managers, and principal stockholders of corporation*

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- a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent or more of the issued and outstanding stock, of the corporation?

Officers

Edwin J. Beinecke, President, 111 Broadway,
New York, N.Y.

Frederick M. Sanders, Executive Vice President
and Secretary, 111 Broadway, New York, N.Y.

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D. Grant Scott, Vice President, 111 Broadway,
New York, N.Y.

Arthur J. Flohr, Vice President and Treasurer,
111 Broadway, New York, N.Y.

C. R. Burmeister, Comptroller, 111 Broadway,
New York, N.Y.

*Debtor's Petition for Arrangement: Exhibit G.**Directors*

Edwin J. Beinecke, 111 Broadway, New York, N. Y.
Edward F. Barrett, 50 Church St., New York, N. Y.
Harry Bronner, 38 Wall Street, New York, N. Y.
Lou R. Crandall, 595 Madison Avenue, New York, N. Y.
Clarke G. Dailey, 115 Broadway, New York, N. Y.
Arthur J. Flohr, 111 Broadway, New York, N. Y.
L. Boyd Hatch, 1 Exchange Place, Jersey City, New Jersey
Otto Marx, 25 Broad Street, New York, N. Y.
John Reis, P. O. Box 370, Summerville, S. C.
Frederick M. Sanders, 111 Broadway, New York, N. Y.
Henry C. Von Elm, 55 Broad Street, New York, N. Y.

There is no stockholder holding 25% or more of the issued and outstanding stock of the Company.

FREDERICK M. SANDERS (sgd)
Executive Vice-President
United States Realty and Improvement
Company

[Verification]

Debtor's Petition for Arrangement.

Exhibit H.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,

Debtor.

In Proceedings for an
Arrangement
No. 74023

AFFIDAVIT PURSUANT TO RULE XI-2

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FREDERICK M. SANDERS, being duly sworn, deposes and says, that he is Executive Vice President and Secretary of United States Realty and Improvement Company, the Debtor herein, and does further depose and say:

(1) Whether the Debtor is occupying any premises under a lease, and if he is, a statement as to the length of the term, the rent reserved, the amount due and owing for rent and what negotiations for a modification of the lease have been had, if any, with whom, and the present status thereof.

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The Debtor is occupying space in the Trinity Building, 111 Broadway, New York, N. Y. under a lease from May 1, 1939 to April 30, 1940, the tenant having the privilege of canceling the same at the end of any month during said term on ten days' prior written notice. The rental is \$8,822.00 per year, payable monthly in advance, and the instalment payable May 1, 1939 has been paid. There is no amount presently due and owing thereon.

Debtor's Petition for Arrangement: Exhibit H.

and there have been no negotiations for a modification thereof. Such lease is in full force and effect.

(2) Whether or not any creditors' committee has been designated by the Debtor's creditors and, if so, the names and addresses of the members of such committee.

No creditors committee has been designated in accordance with Chapter XI of the Bankruptcy Act.

There are, however, according to notices in newspapers and circulars, two committees, one known as "Trinity Buildings Corporation Bondholders Committee", consisting of James A. Beha, David G. Baird, Peter E. Bennett, Lloyd Lubetkin and Eugene W. Potter, the Secretary of which is John P. Dailey, 120 Broadway, New York, N. Y., and the counsel for which is Simpson, Thacher and Bartlett; and the other known as "Trinity Buildings Corporation of New York Mortgage Certificate Bondholders Committee", consisting of Peter Grimm, Charles F. Simmons, Erwin Stugard, Leonard A. Wales and Guy Wheeler, the Secretary of which is Douglas G. Wagner, 40 Exchange Place, and the counsel for which is Ralph Montgomery Arkush.

Deponent has no knowledge or information, sufficient to form a belief, as to whether either of said committees, or any members thereof, either are or represent creditors of the Debtor.

(3) If the Debtor desires to continue the operation of the business:

(a) The estimated amount of the weekly payroll to employees (exclusive of the officers, stockholders and directors, if a corporation) for a period of thirty days

Debtor's Petition for Arrangement: Exhibit H.

following the filing of the Petition proposing an Arrangement.

The estimated weekly payroll of employees of the Debtor for the next thirty days is at the rate of \$375.00 per week, exclusive of officers, stockholders or directors.

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(b) The amounts now being paid and proposed to be paid for services for a period of thirty days following the filing of the Petition proposing an Arrangement:

(1) if a corporation, to officers, stockholders or directors:

The amounts now being paid and proposed to be paid for services for a period of thirty days following the filing of the Petition to officers, stockholders and directors are as follows:

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F. M. Sanders, Executive Vice President, Secretary, Director and Stockholder, at the rate of \$750 per month;

Arthur J. Flohr, Vice President, Treasurer, Director and stockholder, at the rate of \$500 per month;

Mary Rittenband, Stenographer and Stockholder, at the rate of \$32 a week;

Henry B. Roters, Clerk and Stockholder, at the rate of \$61 a week;

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Sadie McNally, Typist and Stockholder, at the rate of \$32 a week;

Frank X. Tracey, Clerk and Stockholder, at the rate of \$48 a week.

In addition the Debtor pays to its directors who are not officers and receiving a salary in such capacity, \$25 for each meeting which they attend.

Debtor's Petition for Arrangement: Exhibit H.

(2) if an individual or a partnership, to the individual or the members of the partnership.

Not applicable.

(4) The estimated additional operating expenses for the period of thirty days following the filing of the Arrangement Petition.

The estimated actual operating expenses in addition to the salaries above mentioned for the period of the next thirty days should consist principally of office rent and general office expense, such as telephone, etc., and should not amount to more than \$1,000. However, on an accrual basis the Debtor will have to accrue the interest on outstanding Debentures and bank loans, taxes on real estate, etc., none of which are to be paid during the next thirty days and which would probably on the accrual basis amount to several thousand dollars.

(5) The estimated gain or loss in the operation of the Debtor's business for a period of thirty days following the filing of the Arrangement Petition.

It is estimated that the accrued income would exceed accrued expenses for the next thirty days by approximately \$6700.00. However, the following month it is estimated will probably show a loss of \$2,000.00. The Debtor on the accrual basis has not had an income for in excess of the past three years but has consistently shown a loss by reason of the conditions in real estate in the financial district of New York.

(6) Such additional information as may fully inform the Court relative to the desirability of the Debtor continuing business.

The sole purpose of the Arrangement and the proceedings instituted under the annexed Petition is to

Debtor's Petition for Arrangement: Exhibit H.

modify and extend the terms of the existing guarantee by the Debtor of the First Mortgage Loan on Trinity Buildings Corporation of New York and the share certificates therein. Inasmuch as consents to the Arrangement have been received from a considerable number of holders of rights under such guarantee, it is proposed that the Debtor continue its business as heretofore meeting all of its liabilities and obligations as the same become due, with the exception of its aforesaid guarantee. It is inadvisable, on information and belief, and would be detrimental to discontinue or interrupt the business of the Debtor since all creditors and stockholders would suffer thereby. It is also unnecessary, on information and belief, to have a trustee or receiver appointed since the Debtor proposes to continue its business as in the past and the Arrangement merely contemplates the extension and modification of one obligation of the Debtor.

FREDERICK M. SANDERS (sgd)

Sworn to before me this

24th day of May, 1939.

HENRY M. MARX (sgd)

Notary Public, Westchester County

Certificate Filed in New York County

N. Y. Co. Clk's No. 170, Reg. No. 0M150

Bronx Co. Clk's No. 21, Reg. No. 44-M-40

Kings Co. Clk's No. 158, Reg. No. 164

Commission expires March 30, 1940

(Notarial Seal)

[Exhibits F and I attached to Debtor's Petition for an Arrangement have been omitted, pursuant to stipulation.]

**Order Approving Debtor's Petition for
Arrangement, Dated May 31, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

Upon reading and filing the annexed Petition of United States Realty and Improvement Company, verified by Edwin J. Beinecke, President, on the 31st day of May, 1939, and the Exhibits and Schedules thereto affixed, and after hearing White & Case, counsel for the Debtor; it is

FOUND; ,

1. United States Realty and Improvement Company is a Debtor within the definition of Section 306 (3) of the Bankruptcy Act.

2. The aforesaid Petition of the Debtor has been properly filed under Section 322 of the Bankruptcy Act.

3. The Schedules annexed to said Petition, marked D, E, F, G and H, are full compliance with the provisions of Chapter XI of the Bankruptcy Act, the General Orders in Bankruptcy and the General Bankruptcy Rules of this Court. Until further order of this Court no other schedules or exhibits need be filed. In addition, the Petition complies with Sections 323 and 324 of the Bankruptcy Act.

Therefore, it is

*Order Approving Debtor's Petition for
Arrangement.*

ORDERED, ADJUDGED AND DECREED THAT:

4. Until further order of the Court the Debtor shall continue in possession and control of its assets and properties of whatever description and wheresoever situate, subject to the control of this Court. During such possession by the Debtor and until further order of the Court the officers and directors of the Debtor shall be entitled to receive salary and compensation from the Debtor at the same rate as heretofore (as set forth in Exhibit G, Statement of Affairs, annexed to the said Petition) and no other officer or director of the Debtor shall be entitled to receive any compensation nor shall any persons be elected or appointed to any office of the Debtor or to fill any vacancy or otherwise in such office without the prior approval of the Court. The employees of the Debtor shall continue to receive compensation as heretofore but without increase.

5. The Debtor be and hereby is authorized and directed until further order of the Court to continue its business and to operate, conduct and manage its assets, property and business wherever situate and to that end to exercise its authorities and franchises and discharge all duties obligatory upon it and to collect and receive the income, rents, tolls, issues and profits of its business, to collect in due course all outstanding accounts and all interest and dividends on securities belonging to it and to pay in due course all obligations and liabilities of the Debtor, whether incurred before or after the date of this Order with the sole exception of any liability or obligation with respect to its Guarantee dated June 1, 1919, of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Gold Loan, due June 1, 1939, and the Share Certificates therein. Further-

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*Order Approving Debtor's Petition for
Arrangement.*

more, the Debtor be and hereby is authorized and directed until further order of this Court to lease or sell any and all its property, real or personal, upon such terms and conditions as the Debtor may in the ordinary course of business deem proper and advisable for the operation and conduct of its business.

6 Until further order of this Court, Guaranty Trust Company of New York, as mortgagee, and all holders of share certificates and coupons in the aforesaid Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Gold Loan, their successors and assigns and all persons, firms or corporations claiming by, under or through them or any of them, are hereby severally and respectively enjoined and barred from prosecuting or continuing against the Debtor, except in this proceeding, or against any of the assets of the Debtor, any suit or proceeding arising out of or based upon the aforesaid Guarantee, Loan or share certificates therein and from levying any attachments, executions or other processes upon or against any of the property constituting the Estate of the Debtor or taking or attempting to take into their possession any part of the property constituting the Estate of the Debtor or from doing any act whatsoever to interfere with the possession, operation or management by the Debtor of the property and business constituting the Estate or interfering in any manner with the directors, officers, managers, agents or employees of the Debtor in the discharge of their duties or interfering in any manner with the administration and disposition of the affairs and properties constituting the Estate of the Debtor: provided, however, that this injunction expressly shall not bar any persons, firms or corporations other than those whose claims are based upon the aforesaid Guarantee, Loan or share-

*Order Approving Debtor's Petition for
Arrangement.*

certificates therein) from prosecuting such suits and taking such action against the Debtor and its property as they may desire.

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7. A meeting of creditors shall be held before this Court in Room 1105, United States Court House, Foley Square, Borough of Manhattan, New York, N. Y., on June 28, 1939, at 3 o'clock P. M., Eastern Daylight Saving Time, or as soon thereafter as counsel can be heard, at which meeting:

(a) proofs of claim shall be received and allowed or disallowed;

(b) the Debtor shall be examined and witnesses heard on any matter relevant to the proceeding;

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(c) written acceptances on the proposed Arrangement of creditors affected by the Arrangement shall be received and determined, and

(d) All parties shall show cause why the following matters hereby provisionally determined should not be made final:

(i) determine the sole persons affected by the Arrangement are holders of rights under the aforesaid Guarantee;

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(ii) for the purpose of the Arrangement and its acceptance, the division of creditors into classes is as follows:

(a) creditors entitled to realize under the Guarantee;

Order Approving Debtor's Petition for Arrangement.

(b) all other creditors (not affected by the Arrangement) ;

(iii) any proof of claim filed by Guaranty Trust Company of New York under the aforesaid Guarantee shall not be considered in computing for the purposes of the Arrangement and its acceptance the number and amount of acceptances and the number and amount of proofs of claim filed with respect to such Guarantee;

(iv) the Arrangement be confirmed upon a showing of proper compliance with the Bankruptcy Act;

(v) The form of Guarantee as annexed to the Arrangement as Exhibit A be approved and the execution of the same be authorized;

(vi) the consummation of the Arrangement be ordered.

(c) said meeting may be adjourned from time to time without other notice than by announcement at said meeting of any adjournment thereof.

8. The Debtor is hereby authorized to file with the Court an application for the confirmation of the Arrangement; by filing a petition showing compliance with Section 362 of the Bankruptcy Act within 15 days of the date hereof or such other period as may be further ordered by the Court, and if such application for confirmation of the Arrangement is so filed, the hearing on the confirmation or any objections to the

*Order Approving Debtor's Petition for
Arrangement.*

confirmation will be held at the first meeting of creditors hereinabove ordered.

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9. The Debtor within ten days of the entry hereof is hereby authorized and directed (a) to deposit or cause to be deposited in the United States mail, postage prepaid, a copy of a notice in substantially the form annexed hereto as Exhibit I, in envelopes addressed to all known creditors and stockholders of the Debtor, and (b) to cause to be published once in the Daily News Record and the New York Herald Tribune such form of notice.

Such notice where mailed shall be accompanied by a copy of the proposed Arrangement, a summary of the liabilities as shown by the Schedules and a summary of the assets as shown by the Schedules.

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The foregoing mailing and publication of notice be and hereby is held to be proper and sufficient notice in compliance with the provisions of Chapter XI of the Bankruptcy Act.

10. A copy of the foregoing notice and of this order and the Petition of the Debtor with respect thereto, including all exhibits, shall be mailed by the Debtor to the Secretary of the Treasury of the United States by registered mail at least fifteen days prior to the date of the hearing hereinabove provided for.

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11. Until further order of the Court the Debtor be and hereby is exempted from the provisions of Rule XI(8) and the Debtor is hereby directed in lieu of the requirements of such Rule to file a report and summary of the operations of its business at the termination of these proceedings.

Dated: May 31, 1939.

Vincent L. Leibell
U. S. D. J.

**Memorandum and Outline of Securities and
Exchange Commission, Dated July 5, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

MEMORANDUM.

SIRS:

On Friday afternoon, June 30, 1939, representatives of the Securities and Exchange Commission conferred with Judge Vincent L. Leibell concerning the proceeding which the United States Realty and Improvement Company has instituted under Chapter XI of the Bankruptcy Act. Judge Leibell stated that he would permit the Commission to appear in the proceeding *as amicus curiae* to present its views therein.

Judge Leibell requested that you be informed of these facts, and also that we advise you of the points which the Commission will advance at the adjourned hearing on confirmation of the proposed Arrangement on July 7, 1939. While, in view of the extended Governmental holiday, it has been impossible to complete a comprehensive brief in time for the hearing, we have prepared for your information the attached outline of the Commission's arguments.

Permission to submit a brief to the Court, with the usual opportunity for the submission of answering briefs, will be requested at the conclusion of the oral presentation of the Commission's views.

*Memorandum and Outline of Securities and
Exchange Commission.*

Dated New York, N. Y., July 5, 1939.

Yours, etc.,

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EDMUND BURKE, Jr.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch

Attorneys for

SECURITIES AND EXCHANGE COMMISSION

Office and Post Office Address:

120 Broadway,

380

Borough of Manhattan,

City of New York, N. Y.

To:

White & Case, Esqs.,
14 Wall Street,
New York, N. Y.

Simpson, Thacher & Bartlett, Esqs.,
120 Broadway,
New York, N. Y.

Ralph Montgomery Arkush, Esq.,
15 Broad Street,
New York, N. Y.

381

William E. Bardusch, Esq.,
63 Wall Street,
New York, N. Y.

*Memorandum and Outline of Securities and
Exchange Commission.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement

No. 74023

[SAME TITLE]

OUTLINE OF MATTERS TO BE DISCUSSED BY THE
SECURITIES AND EXCHANGE COMMISSION

It is the Commission's view that the matters hereinafter stated lead to the conclusion (1) that the order of the Court dated May 31, 1939, finding that the debtor's petition was properly filed under Chapter XI of the Bankruptcy Act, should be vacated; (2) that confirmation of the debtor's proposed arrangement should be denied as not for the best interests of creditors; as not fair and equitable, or feasible; and as not proposed in good faith; and (3) that the petition and the proceeding should be dismissed.

I. The United States Realty and Improvement Company may not properly file a petition under Chapter XI. The "arrangement" procedure provided by that Chapter is not appropriate to the reorganization of corporations with securities in the hands of the public.

A. Consideration and comparison of the legislative history of Chapters X and XI demonstrate, among other things:

(1) That Chapter XI amends and revises the "composition" and "extension" procedures formerly contained in Sections 12 and 74 of the Bankruptcy Act; and that it is intended to be applicable to individuals and to the small, closely-held corporation in which there is no public investor interest;

*Memorandum and Outline of Securities and
Exchange Commission.*

(2) that Chapter X is the only chapter of the Bankruptcy Act, as amended, which contains adequate machinery for the "reorganization" for the large corporation in which there is a public interest; and that Chapter X is the only chapter of the Bankruptcy Act, as amended, which was intended to provide a "reorganization" procedure for the large corporation with publicly held securities;

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(3) that Chapter X thoroughly revised the machinery for "corporate reorganizations", as it formerly existed in Section 77B, and introduced additional measures into the reorganization system for the express purpose of enabling the courts to afford more complete protection to the investing public; and

386

(4) that such amendatory provisions have not been introduced into Chapter XI; and that this is consistent with the legislative understanding and intention that corporations with a public investor interest would be reorganized not under Chapter XI, but under Chapter X.

II. The absence of a specific restriction in Chapter XI does not permit corporations with publicly held securities to file petitions or effect arrangements under Chapter XI, for it has frequently been held that a statute will not be construed by the courts to include a case which, though within the literal meaning of the statute, was not within the aim or intention of the legislature.*

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* E. g., *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *American Security Co. v. District of Columbia*, 224 U. S. 491 (1911).

*Memorandum and Outline of Securities and
Exchange Commission.*

88 Similarly, under the provisions of Section 77B, the federal courts have dismissed proceedings as not filed in "good faith" where they had jurisdiction by a literal reading of the statute, but deemed the exercise of that jurisdiction improper and beyond the intentment of the statute.

III. The "arrangement" procedure provided by Chapter XI is not properly available to a corporation which has a preponderance of publicly held secured obligations and stock interests.

89 A. An arrangement under Chapter XI may provide for the settlement, satisfaction, or extension of unsecured debts only. Secured obligations and stock interests cannot be modified directly in a Chapter XI proceeding.

B. A corporation cannot isolate a contingent unsecured obligation for purposes of an arrangement under Chapter XI and leave its major indebtedness unaffected without regard for its financial requirements.

C. Secured obligations and stock interests may be modified under Chapter X. In a Chapter X proceeding, therefore, the debtor's debt and capital structure could be reorganized in a proper, satisfactory, and equitable fashion.

90 IV. If the debtor corporation has resort, as contemplated by Congress and the statute, to Chapter X, instead of to Chapter XI, it would be possible to subject both the primary obligor and the guarantor to the jurisdiction of the federal court, with the consequence that the court could consider the matter in the aggregate, uniform standards could be applied, simultaneous action could be obtained, and parallel results could be produced.

*Memorandum and Outline of Securities and
Exchange Commission.*

V. When considered in light of the above, the proposals here intended to be accomplished by the debtor are clearly not "fair and equitable", or "for the best interests of creditors", and the procedure to which it has resorted does not meet the test of good faith.

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VI. The statutory requirements of "good faith" are not established in a case in which a debtor attempts to avoid the policy of Congress, adopted in the interests of public security holders and embodied in Chapter X of the Bankruptcy Act, by resort to another, and inappropriate, chapter of that Act. Any doubts concerning the construction of Chapter XI should be resolved in the interests of public security holders, and the court has full power to do so.

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Respectfully submitted,

EDMUND BURKE, JR.
Edmund Burke, Jr.

J. ANTHONY PANUCH
J. Anthony Panuch

Attorneys for
SECURITIES AND EXCHANGE COMMISSION

393

**Order to Show Cause re Intervention,
Dated July 18, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of
**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**
Debtor

**SECURITIES AND EXCHANGE
COMMISSION,**
Applicant for
Intervention

In Proceedings for an
Arrangement
No. 74023

**ORDER TO SHOW
CAUSE**

Upon the annexed motion of the Securities and Exchange Commission, it is

ORDERED that the debtor, Guaranty Trust Company of New York, and the committees who have heretofore intervened in this proceeding, show cause before me in Room 506, in the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1939, at 4:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an order should not be made granting to the Securities and Exchange Commission leave to intervene in this proceeding, and for such other and further relief as to the court may seem proper.

AND IT IS FURTHER ORDERED that service of a copy of this order to show cause and of the papers upon which it is granted upon the attorneys for the above named persons on or before the 18th day of July, 1939, at 5:00 P. M., shall be sufficient.

Dated, New York, N. Y., July 18th, 1939.

Vincent L. Leibell
U. S. D. J.

**Motion of Securities and Exchange Commission
for Leave to Intervene.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

The Securities and Exchange Commission, by Edmund Burke, Jr. and J. Anthony Panuch, its attorneys, moves for leave to intervene in this proceeding for the purpose of moving this Court

- (a) to dismiss the Debtor's petition herein;
- (b) to deny confirmation of the Debtor's Arrangement; and
- (c) to dismiss this proceeding, on the grounds stated in the motions submitted herewith.

The motion for intervention is based on the following grounds:

I.

On May 31, 1939, the above named Debtor filed a petition under Section 322 of the Bankruptcy Act of 1898, as amended, proposing an arrangement under Chapter XI of that Act. On May 31, 1939, this Court entered an order finding, among other things, that the aforesaid petition of the Debtor has been properly filed under said Section 322.

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

II.

Upon information and belief, the Debtor has outstanding the following securities in the hands of the public:

<i>Description</i>	<i>Amount</i>
Fifteen-Year Sinking Fund 6% Gold Debentures of G.A.F. Realty Corporation dated January 1, 1939 and due January 1, 1944 (Guaranteed by the Debtor as to principal, interest and sinking fund payments)	\$ 1,203,500.00
6% Sinking Fund Debentures of Debtor due January 1, 1944	1,135,500.00
Guarantee of the principal, interest and sinking fund payments on the First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan Certificates, dated June 1, 1919, and due June 1, 1939, of Trinity Buildings Corporation of New York	3,710,500.00
900,000 shares no par value stock (Stated value: \$20 per share)	18,000,000.00

The Debtor's capital stock is listed on the New York Stock Exchange, and is registered with the Securities and Exchange Commission as a listed security under the provisions of the Securities Exchange Act of 1934, as amended. A registration statement for 63,000 shares of the Debtor's capital stock has also been filed with the Securities and

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

Exchange Commission under the provisions of the Securities Act of 1933, as amended.

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III.

The Securities and Exchange Commission (hereafter referred to as the Commission) is an agency of the United States, created pursuant to Section 4(a) of the Securities Exchange Act of 1934, as amended. Under the provisions of the Bankruptcy Act of 1898, as amended, the Commission is charged with certain duties and vested with certain rights, powers and privileges for the purpose of enabling it to protect and represent investors and the general public in connection with the reorganization of corporations under Chapter X of that Act. Among these rights, powers, privileges and duties, are the following:

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A. Section 172 provides that any plan of reorganization which the Judge regards as worthy of consideration must, in any case in which the Debtor's scheduled indebtedness exceeds \$3,000,000, be submitted to the Commission for an advisory report, before the plan may be approved by the Judge as fair and equitable and feasible.

B. Section 175 requires that the report of the Commission, if any, filed in the proceeding, or a summary of the report prepared by the Commission, be transmitted to all creditors and stockholders who are affected by the plan.

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C. Section 203 provides that the Commission must, if requested by the Judge, and may, upon its own motion, if approved by the Judge, file a notice of its appearance in any proceeding. It further provides that, upon the filing of such

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

a notice of appearance, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in the proceeding, and shall be deemed to have intervened in respect of all matters in the proceeding with the same force and effect as if a petition for that purpose had been allowed by the Judge, with the exception that the Commission may not appeal or file any petition for appeal in the proceeding.

D. Section^o 265 provides that the Commission shall be given notice of all steps taken in connection with any proceeding, and that there shall be transmitted to the Commission copies of prescribed papers filed in the proceeding and of such other papers as the Commission may request or the Court may direct be transmitted to it.

IV.

Schedules attached to the petition filed by the Debtor state that the Debtor has assets of \$23,378,988.90, liabilities of \$5,538,985.05, and contingent liabilities in excess of \$3,900,000.00. Since the Debtor's scheduled indebtedness exceeds \$3,000,000.00, any plan of reorganization for the Debtor which the Judge deemed worthy of consideration would have to be submitted to the Commission for an advisory report, pursuant to Section 172, and pursuant to Section 175 a copy of the report, or a summary thereof prepared by the Commission, would have to be transmitted to all creditors and stockholders who are affected by the plan.

V.

The Commission represents that the petition of the Debtor has been improperly filed under Chapter XI of the Bank-

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

ruptcy Act, as amended, on the grounds that Chapter XI is not available for a corporation which has publicly held securities, and that if such a corporation desires to adjust its obligations under the provisions of the Bankruptcy Act, as amended, it must file a petition under Chapter X thereof.

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VI.

The aforesaid issue raises an important question of jurisdiction and administration under the Bankruptcy Act. The determination of the issue in this proceeding affects the interests of investors who hold the Debtor's securities, and the interest of the Commission in the protection and exercise of the rights, powers, privileges and duties conferred upon it, as an agency of the United States, in the interests of the public. If the proposed arrangement is confirmed and the proceedings are not dismissed, the interests of investors in this proceeding will be improperly affected; the Commission will be denied the rights, powers and privileges conferred upon it by Chapter X; and it will be prevented from performing its duties under that chapter. In particular, there will not be referred to the Commission for the preparation of an advisory report such plans as the judge deems worthy of consideration.

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VII.

The Commission's interests, as aforesaid, and the interests of the investing public, are not represented by any party to this proceeding. The adequate representation of these interests requires that the Commission be permitted to intervene for the purpose of taking all such steps as may be appropriate for their protection in this proceeding, and for

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*Motion of Securities and Exchange Commission
for Leave to Intervene.*

412 the purpose of enabling it to appeal in the event that any adverse orders are entered in the District Court concerning these interests.

WHEREFORE, the Commission respectfully prays for the annexed order to show cause, for which no previous application has been made.

Dated, New York, N. Y., July 18, 1939.

EDMUND BURKE, JR.
Edmund Burke, Jr.

413 J. ANTHONY PANUCH
J. Anthony Panuch

Attorneys
for the

SECURITIES AND EXCHANGE COMMISSION

[Verification]

Answer of Debtor to Motion to Intervene.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

415

In the Matter
of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor.

In Proceedings for an
Arrangement
No. 74023

TO THE HONORABLE THE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK:

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The answer of United States Realty and Improvement Company, Debtor, to the motion of the Securities and Exchange Commission for leave to intervene, verified by J. Anthony Panuch, on July 18, 1939, as Special Counsel to the Securities and Exchange Commission respectfully states:

FIRST: The Securities and Exchange Commission is a body created by an Act of Congress and there is no Act of Congress authorizing the Securities and Exchange Commission in any manner or in any respect to participate in a proceeding under Chapter XI of the Bankruptcy Act. Therefore, the motion of the Securities and Exchange Commission for leave to intervene is ultra vires such Commission.

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SECOND: Chapter XI does not provide for participation of the Securities and Exchange Commission in any proceeding brought thereunder. Therefore, this Court has no jurisdiction to permit the Securities and Exchange Commission to intervene or otherwise participate in this proceeding.

Answer of Debtor to Motion to Intervene.

THIRD: The Securities and Exchange Commission is not a proper party to this proceeding and is not an interested party and therefore is not entitled to intervene.

FOURTH: The Debtor alleges that the allegations of the Securities and Exchange Commission regarding its rights in a Chapter X proceeding and specifically referring to Section 208 which denies such Commission the right of appeal, do not constitute any authority for such Commission to act in the premises or authority for such Commission to appeal from any orders of the Court herein, which as is frankly stated, is the purpose for the Commission's motion for leave to intervene.

FIFTH: The Debtor denies that its Petition has been improperly filed under Chapter XI and further denies that the provisions of Chapter X are available or applicable to it.

SIXTH: The Debtor denies that the Securities and Exchange Commission has any duties, privileges, rights or powers in this proceeding and has any jurisdiction in the premises.

SEVENTH: The Debtor alleges that no Plan of Reorganization is being submitted but that the Arrangement proposed herein merely contemplates the extension and modification of one class of unsecured debt of the Debtor.

EIGHTH: The Securities and Exchange Commission not being a proper party and not being authorized to act in the premises, and the Court having no jurisdiction to permit the intervention of such Commission, such Commission is not entitled to any right to appeal from any orders of the Court herein nor further to participate herein.

Answer of Debtor to Motion to Intervene.

WHEREFORE, the Debtor respectfully prays that the motion of the Securities and Exchange Commission for leave to intervene be in all respects denied.

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UNITED STATES REALTY AND IMPROVEMENT
COMPANY

By (sgd.) A. J. Flohr
Vice-President

ATTEST:

(sgd.) F. M. Sanders,
Secretary

[VERIFICATION]

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Order Appealed from re Intervention of Securities and Exchange Commission, Dated July 28, 1939.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor

SECURITIES AND EXCHANGE
COMMISSION,

Applicant for
Intervention

In Proceedings for an
Arrangement
No. 74023

**ORDER FOR
INTERVENTION**

The Securities and Exchange Commission, having duly moved this Court for an order permitting it to intervene in this proceeding for the purpose of moving this Court to dismiss the Debtor's petition herein, to deny confirmation of the Debtor's proposed Arrangement, and to dismiss the proceeding, and for such other and further relief as to the Court may seem proper, and said motion having regularly come on to be heard before me on the 20th day of July, 1939, after due notice to the Debtor, the Guaranty Trust Company of New York, and the committees which heretofore intervened in this proceeding,

Now, on reading the motion verified the 18th day of July, 1939, the order to show cause dated the 18th day of July, 1939, the answer of the Debtor verified the 20th day of July, 1939, and upon all other papers and proceedings heretofore had herein, and after hearing J. Anthony Panuch, attorney for the Securities and Exchange Commission, in support of the motion, and White and Case (Joseph M. Hartfield, of Counsel), attorneys for the Debtor, and Ralph Montgomery Arkush, attorney for the Grimm Committee, herein, in opposition thereto, it is on motion of Edmund

*Order Appealed From re Intervention of Securities
and Exchange Commission.*

Burke, Jr., and J. Anthony Panuch, attorneys for the
Securities and Exchange Commission,

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ORDERED that the Securities and Exchange Commission
be and it hereby is permitted to intervene in this proceeding
for the purpose of moving this Court to dismiss the Debtor's
petition, to deny confirmation of the Debtor's proposed
Arrangement, and to dismiss the proceeding, for the purpose
of taking such other steps as may be appropriate to contest
the jurisdiction of the Court over this proceeding under
Chapter XI of the Bankruptcy Act, as amended, and for the
purpose of enabling the said Commission to appeal from any
order made in this proceeding with respect thereto; and
it is further

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ORDERED that notice of hearings upon any questions
relating to the foregoing matters as to which the Securities
and Exchange Commission is hereby permitted to intervene
shall be given to Edmund Burke, Jr., and J. Anthony
Panuch, its attorneys, at their offices, No. 120 Broadway,
New York City, New York.

Dated New York, N. Y., July 28th, 1939.

VINCENT L. LEIBELL,
U. S. D. J.

429

**Order to Show Cause re Motions to Dismiss,
Dated July 18, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**

Debtor.

**SECURITIES AND EXCHANGE
COMMISSION,**

Intervenor.

In Proceedings for an
Arrangement

No. 74023

**ORDER TO SHOW
CAUSE**

Upon the annexed motions of the Securities and Exchange Commission, it is

ORDERED that the debtor, Guaranty Trust Company of New York, and the committees who have heretofore intervened in this proceeding, show cause before me in Room 506, in the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1939, at 4:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why the order of this court, dated May 31, 1939, finding that the petition herein was properly filed under Section 322 of the Bankruptcy Act, as amended, should not be vacated, why the petition herein should not be dismissed, why confirmation of the proposed arrangement should not be denied, and why the proceedings herein should not be dismissed, and why such other and further relief as to the court may seem proper should not be granted.

AND IT IS FURTHER ORDERED that service of a copy of this order to show cause and of the papers upon which it is granted upon the attorneys for the above named persons on or before the 18th day of July, 1939, at 5:00 P. M., shall be sufficient.

Dated, New York, N. Y., July 18th, 1939.

Vincent L. Leibell,

**Motions to Vacate Order Approving Petition
and to Dismiss Petition, and to Deny Con-
firmation of Arrangement and to Dismiss
Proceedings.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement

No. 74023

[SAME TITLE].

The Securities and Exchange Commission, by its attorneys Edmund Burke, Jr. and J. Anthony Panuch, moves to vacate the order dated May 31, 1939, finding that the Debtor's petition had been properly filed under Section 322 of the Bankruptcy Act, as amended, and to dismiss the petition on the grounds that the petition was not properly filed under Section 322 because the provisions of Chapter XI of the Bankruptcy Act do not apply to a debtor corporation which has securities outstanding in the hands of the public.

The Securities and Exchange Commission, by its attorneys, further moves that the Court deny confirmation of the proposed arrangement herein and dismiss the proceedings on the grounds:

(1) That the Court does not have jurisdiction over this proceeding because Chapter XI of the Bankruptcy Act, as amended, under which the petition was filed, does not apply to a debtor corporation which has securities outstanding in the hands of the public.

(2) That the proposed arrangement cannot properly be confirmed, and the proceedings may therefore be dismissed.

*Motions to Vacate Order Approving Petition and to Dismiss
Petition, and to Deny Confirmation of Arrangement
and to Dismiss Proceedings.*

436 pursuant to Section 376(2), because for the reasons set
forth in the preceding paragraph, (a) the provisions of
Chapter XI have not been complied with, as required by
Section 366(1); (b) the proposed arrangement is not for
the best interests of creditors of the debtor, as required by
Section 366(2); (c) the proposed arrangement is not fair
and equitable and feasible, as required by Section 366(3);
and (d) the arrangement has not been proposed in good faith,
as required by Section 366(5).

437 WHEREFORE, the Commission prays for the annexed
order to show cause, for which no previous application has
been made.

EDMUND BURKE, JR.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch

Attorneys

for the

SECURITIES AND EXCHANGE COMMISSION

Answer of Debtor to Motions to Dismiss.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

439

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor,

In Proceedings for an
Arrangement.
No. 74023

ANSWER TO MOTION OF SECURITIES AND EX-
CHANGE COMMISSION TO VACATE ORDER APPROV-
ING PETITION AND TO DISMISS PETITION AND TO
DENY CONFIRMATION OF ARRANGEMENT AND TO
DISMISS PROCEEDINGS.

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STATE OF NEW YORK

88.:

COUNTY OF NEW YORK

HENRY M. MARX, being duly sworn, déposes and says, that he is an attorney duly admitted to practice before this Court and that he is associated with Messrs. White & Case, 14 Wall Street, New York, N. Y., attorneys for United States Realty and Improvement Company, the Debtor herein. That the motion of the Securities and Exchange Commission to vacate the order approving the petition herein and to dismiss the petition and to deny confirmation of Arrangement and to dismiss the proceeding is premature inasmuch as the Securities and Exchange Commission is not a party to this proceeding.

441

Answer of Debtor to Motions to Dismiss.

The Securities and Exchange Commission has no standing and is not a proper party to this proceeding for the reasons set forth in the answer of the Debtor to the motion of the Securities and Exchange Commission for leave to intervene. Deponent believes that the provisions of Chapter XI have been complied with; that the Arrangement is for the best interest of creditors; that it is fair and equitable and feasible; that the Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt and the proposal of the Arrangement and its acceptance are in good faith and have not been made or procured by any means or promises or acts forbidden by the Bankruptcy Act (all as set forth in Section 366 of the Bankruptcy Act).

WHEREFORE, Deponent respectfully prays that the aforesaid motion of the Securities and Exchange Commission which has not been verified as required by the rules of this Court be in all respects denied.

HENRY M. MARX.

Sworn to before me this
20th day of July, 1939.

ROBERT B. HEINKEL.

ROBERT B. HEINKEL

Notary Public, New York County

N. Y. Co. Clk's No. 386 Reg. No. OH583

Cert. filed in Kings Co. No. 240 Reg. No. 440

Cert. filed in Bronx Co. No. 60, Reg. No. 171H40

Commission Expires March 30, 1940

(Notarial Seal.)

**Order Appealed from re Motions to Dismiss,
Dated July 28, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

445

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor,
SECURITIES AND EXCHANGE
COMMISSION,
Intervenor.

In Proceedings for an
Arrangement.
No. 74023.

**ORDER DENYING
MOTIONS**

The Securities and Exchange Commission, having duly moved this Court for orders vacating the order of this Court dated May 31, 1939, which found that the Debtor's petition had been properly filed under Section 322 of the Bankruptcy Act, as amended, dismissing the Debtor's petition herein, denying confirmation of the Debtor's proposed Arrangement, and dismissing the proceeding, and said motions having regularly come on to be heard before me on the 20th day of July, 1939, after due notice to the Debtor, the Guaranty Trust Company of New York, and the committees which have heretofore intervened in the proceeding,

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Now, on reading the said motions, the order to show cause dated the 18th day of July, 1939, the answer of the Debtor sworn to the 20th day of July, 1939, and the Debtor having in open court withdrawn and waived the objection that the aforesaid motions have not been verified, and upon all the other papers and proceedings heretofore had herein, and after hearing J. Anthony Panuch, attorney for the Securities and Exchange Commission, in support of the motion, and

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*Order Appealed from re Motions to Dismiss.
Dated July 28, 1939.*

448 White and Case (Joseph M. Hartfield, of Counsel), attorneys
for the Debtor, and Ralph Montgomery Arkush, attorney
for the Grimm Committee herein, in opposition thereto, it
is . . .

ORDERED that the said motions of the Securities and
Exchange Commission be and the same hereby are in all
respects denied.

Dated New York, N. Y., July 28th, 1939.

VINCENT L. LEIBELL
U. S. D. J.

Order Appealed from re Reference of Proceeding to Referee, Dated July 28, 1939.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

451

In the Matter of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,

Debtor

In Proceedings for an
Arrangement.
No. 74023

**ORDER REFERRING
PROCEEDING TO A
REFEREE.**

UPON all the proceedings heretofore had herein, and pursuant to the directions stated on the record of the hearing on July 27, 1939, it is

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ORDERED, ADJUDGED AND DECREED that the above-entitled proceeding be and it hereby is referred to

HON. JOHN E. JOYCE

one of the Referees in Bankruptcy of this Court, to take such action and such proceedings therein as are required and permitted by the Bankruptcy Act.

Dated, July 28th, 1939.

**VINCENT L. LEIBELL
U. S. D. J.**

453

**Meeting of Creditors before Judge Leibell—
June 28, 1939**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Bankruptcy No. 74,023

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, June 28, 1939,

3 P. M.

APPEARANCES :

WHITE & CASE, Esqrs.,

Attorneys for Debtor ;

Joseph M. Hartfield, Esq.,

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.

Attorneys for Ralph W. Earl and

Donald M. Halsted, as member

of Bondholders Protective Committee.

SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee

of which James A. Beha is chairman ;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

Meeting of Creditors before Judge Leibell—June 28, 1939

DAVIS, POLK, WARDWELL, GARDINER & REED,
Esqrs.,

Attorneys for Guaranty Trust
Company of New York, as Mortgagee;

J. Howland Auchincloss, Esq., and
Carroll H. Brewster, Esq., of Counsel.

457

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a
creditor.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate-
holders;

Charles Foster Brown, Esq., of Counsel.

458

GOODALE, HANSON & HOOKER, Esqrs.,

Attorneys for A. B. W. DeWitt
and Marguerite E. DeWitt, certifi-
cateholders;

George J. Osburg, Esq., of Counsel.

JAMES L. BARGER, Esq.,

Attorney, appearing for himself.

LORENZO D. ARMSTRONG, Esq.,

Attorney for Greenwich Trust
Company of Greenwich, Conn.

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JAMES R. COUPER,

A certificateholder, in person.

CLAUDIUS M. MEEKS,

A certificateholder, in person.

Meeting of Creditors before Judge Leibell—June 28, 1939
Statement.

WATSON, KRISTELLER & SWIFT, Esqrs.,

Attorneys for R. Gilbert Jackson;

Frederic W. Dillingham, Esq., of Counsel.

The Court: This is a meeting of creditors called pursuant to an order signed in this proceeding on May 31st. It was directed in paragraph 7 of that order that this meeting be held for the purpose of receiving and examining the proofs of claim, and that the proofs be received, allowed or disallowed. Since the signing of this order there was submitted to me a further order in reference to the filing of proofs of claim, and also in reference to the filing of an application for a confirmation of the arrangement.

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Mr. Marx: * * * I would like to make this short statement: As of June 1, 1919, the Trinity Buildings Corporation of New York executed and delivered to Guaranty Trust Company of New York, as mortgagee, its bond and first mortgage in the principal amount of seven million dollars to secure its first mortgage twenty year 5½ per cent sinking fund gold loan which became due on June 1, 1939. Such first mortgage covers the premises known as 111-115 Broadway, with respect to which testimony will be offered shortly. Guaranty Trust Company of New York, as such mortgagee, in turn issued and sold participation certificates in said loan to United States Realty & Improvement Company, which was and is the holder of all of the outstanding capital stock of Trinity Buildings Corporation of New York. United States Realty & Improvement Company in turn executed

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and delivered to Guaranty Trust Company of New York, as such mortgagee, a guarantee of the aforesaid loan and the share certificates therein, and sold the certificates to the National City Company which effected a public distribution thereof. Such guarantee is the sole obligation affected by the arrangement. There was filed with the petition for an arrangement on May 31, 1939, a copy of the bond and mortgage and of the guarantee.

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Through the operation of a sinking fund the principal amount of the outstanding share certificates has been reduced to \$3,710,500. All the interest has been paid on such certificates to December 1, 1938, for nineteen and one-half years, but the instalment due on June 1, 1939 has not been paid. Real estate taxes to date have been met.

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The Mortgage Moratorium Law of the State of New York, as your Honor knows, prevents any foreclosure or action for principal on the bond or on the guarantee, even though the principal has matured, so long as interest on the mortgage and taxes on the premises are paid.

In the event of a default in interest or taxes, which permits foreclosure or an action for principal, the fair market value of the premises (believed to be in excess of the amount of the mortgage) can be established as a setoff, thereby preventing any deficiency judgment against either the mortgagor or the guarantor. Therefore, if such action for principal were instituted and such offset were established, United States Realty & Improvement Company, the debtor, would be released from further liability on its guarantee. The mortgage moratorium and deficiency judgment laws now in effect have been extended for at least another year.

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Therefore, as a matter of law, holders of share certificates, as the real parties in interest and actually as mortgagees,

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would have the option, under the interest default which exists at present, of foreclosing and releasing the debtor on its guarantee, or else agreeing to some extension or modification of the guarantee (which has been done by the holders of in excess of fifty per cent of the share certificates). There is a further option of bringing actions periodically for interest and, if paid by the certificate holders of the mortgage, for taxes. But that will be no solution to the problem, as will appear.

It is believed that foreclosure might destroy the equity of the debtor, if any, in the premises, and that the extension and modification of the guarantee contained in the arrangement is a fair one to all parties concerned.

It is true, of course, that the debtor probably would be able to meet taxes and interest at the present rate on the Trinity mortgage for the next year or so, but such payment would not be a solution to the problem since the mortgage moratorium and deficiency judgment laws of the State of New York are of a temporary nature, and such payments would make considerable inroads on the debtor's working capital and might conceivably lead to a forced liquidation either in bankruptcy or in some other insolvency proceeding and to substantial losses to its creditors and stockholders. In addition, unless the situation is solved at the present time, the uncertainty with respect to the ultimate disposition of the Trinity first mortgage loan will continue to be detrimental not only to holders of share certificates and creditors of the debtor, but also to the debtor itself.

The arrangement has been proposed by the debtor as a bona fide offer of a fair solution to the problem. It is to be noted that holders of share certificates have received full interest for nineteen and one-half years, and that the

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principal of the obligation under the loan has been reduced almost fifty per cent by the operation of a sinking fund. It is hoped that, with the modifications and extension proposed, any recovery in real estate in the financial district will lead to a further rapid reduction in the principal amount of the loan and possibly to a refunding thereof. The debtor attempted, some time prior to promulgation of the arrangement, to secure a new loan in order to pay holders of share certificates, but by reason of the reduced earning capacity of the buildings was unable to do so.

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The arrangement may be briefly summarized as follows:

1. There is no change in the physical security or the principal amount;

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2. The maturity is extended for ten years and one month, the one month being to make the interest dates coincide with the fiscal year of the company;

3. The interest rate is to be changed from $5\frac{1}{2}\%$ per annum to 3% per annum fixed, plus 1% for the first five years and 2% for the next five years contingent on income, but, in any event, payable at maturity;

4. The amended modification plan and arrangement contemplates that the primary obligation of Trinity Buildings Corporation of New York, as mortgagor, be similarly modified in a proceeding under the New York State Burchill Act as soon as the arrangement herein is confirmed;

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5. In the event that the plan is confirmed under the Burchill Act, all available net earnings in each year after payment of fixed interest, up to and not in excess of \$50,000,

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are to be deposited in a so-called improvement fund prior to the payment of contingent interest. Such fund is to be used for capital improvements to the premises and may be used with the consent of the corporate trustee for other purposes as set forth in the arrangement;

6. All excess earnings until the principal amount of the mortgage is reduced to \$2,500,000 are to be used for a sinking fund and no dividends are to be paid by the mortgagor until the principal amount of the mortgage shall have been so reduced. After such reduction no dividends shall be paid in any year in excess of amounts set aside in such year for sinking fund purposes and, in any event, dividends shall not exceed \$50,000 in any year so long as the mortgage remains outstanding in any amount.

Incidentally, all excess earnings, as I used the phrase, means after leaving the working capital for Trinity Buildings Corporation of New York of \$50,000.

7. Provision is contained for limiting salaries of officers and directors of Trinity Buildings Corporation of New York or its successor;

8. Both the modified guarantee and the indenture providing for the new bonds under the Burchill Act proceeding are to contain provisions for amendment by consent of holders of two-thirds of such bonds or share certificates, as the case may be, provided that there is no active dissent from any proposed amendment by holders of 20% in principal amount;

9. It is important to realize that no other obligations of the debtor or of Trinity Buildings Corporation are to be

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affected by the arrangement, but that an indebtedness owing by Trinity Buildings Corporation of New York to the debtor in excess of ten million dollars will to all practical purposes be eliminated since it will not be assumed by the new company which will take over the mortgaged premises upon consummation of the Burchill Act foreclosure.

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I now call Mr. Flohr, vice president and treasurer of the debtor, to the stand to testify and to be subject to cross examination.

The Court: Before you do that, I will hear any statement in opposition.

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Mr. Rickaby: If your Honor please, our opposition to the plan is not going to depend very much on this testimony. The statute requires that before a plan or before an arrangement can be confirmed it must be found equitable. In that respect, Chapter XI of this Act is analogous to Chapter X, and it has been repeatedly decided in this circuit that any attempt, in brief language, to chisel creditors and leave the debtor alone, is unfair. I refer, your Honor, to the Day & Meyer case, which is in 93 Fed. (2d) 657, and to the Barclay Park case which preceded it, 90 Fed. (2d) 595. This petition in this proceeding sets forth various obligations of this particular debtor which are secured, and also about \$6000 or \$7000 of other unsecured claims. The holders of these certificates, so far as their relation to this debtor is concerned, are unsecured creditors. They are secured creditors of the debtor's subsidiary, the Trinity Buildings Corporation. Counsel for this debtor referred to the fact that while the principal might not be sued for, the holders of these claims

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would have the option to come in and sue for the interest from time to time as it becomes due. That would also apply to the taxes if they were not paid, and that that might go along for a couple of years. They say in their petition: "No other creditors or class of creditors are affected by the arrangement because the debtor proposes to and is able to pay all of its debts, secured and unsecured, as they mature. All other funded debt of the debtor is secured, and the only unsecured debt besides the aforesaid guarantee is set forth in the schedules annexed."

That amounts to about six or seven thousand dollars. That is the very baldest attempt to chisel these security holders here, these certificate holders.

With reference to the Burchill Act, they know they could not have that relief in the Federal Court, and I do not believe they can get it in the State Court. Col. Hartfield would not attempt to come in here for a minute under Chapter X and try to get away with what they are trying to get away with as a secondary step in the State Court through the medium of the Burchill Act, and I don't believe that they can get away with it there even if they should ever attempt it.

Now, if your Honor please, the purpose of this is to leave the debtor alone, reduce its obligation, leaving its subsidiary enjoying the prospects of the future, if there are any prospects, and chisel the certificate holders. That just cannot be done. I am willing to rest that right on the two decisions which I have cited to your Honor. Those decisions were under Section 77B, which as far as that is concerned, is the same as Chapter X of this Act, and what is fair in one street is fair in the next block, and it cannot be otherwise. What is unfair in one of these routes is unfair in the other one.

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In this particular property I call your Honor's attention to the fact that the debtor contributes nothing. They do not put in any new money. They do not add anything. They do not agree to do anything. They want to keep this for themselves, and there is nothing unique about it. Let us suppose this was some particular industry where the stockholders of the debtor had particular skill, that they could furnish something that nobody else could, and agreed to furnish that skill for a substantial period of time in the future. That situation does not exist here. These are a couple of office buildings, as your Honor very well knows, and there are fifty people in New York who can manage those buildings just as well as the officers of this debtor and its subsidiaries. I say to your Honor that under those decisions, under the Day & Meyer case and the Barclay Park case—this court cannot confirm this arrangement. I do not need any brief on the subject. Those cases that I cited to your Honor are directly in point, and we are willing to stand on them.

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The Court: * * * Now, Colonel, tell me about this. You know this Day & Meyer case and you are familiar with it.

Mr. Hartfield: Yes and with the Barclay case, but of course they are cases where the party seeking the reorganization of the property was the owner of the title, of the leasehold, and they had obligations outstanding. It was proposed in the reorganization to give the capital stock something, but full provision was not made for the bonds. You see, in this case that question and the question of whether or not the plan is a fair one, or whether or not there is any equity will come up in the Burchill proceeding, where the

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34 Trinity Buildings, the owner of the fee, is the party seeking the reorganization in the ordinary 77B case, but here in this case we are dealing with a wholly independent thing, with the guarantee, where the guarantee under the moratorium law is not enforceable at all if they sought to enforce their right to go ahead and take the property from the principal debtor, because if there was proof that the mortgage value of this property was not less than the amount of bonds outstanding, they could get no deficiency judgment and there would be nothing due on the guarantee.

The Court: Suppose they sued for the interest regularly?

Mr. Hartfield: They could sue for the interest but you could see that would be a temporary thing.

The Court: Couldn't they hold you on the guarantee?

35 Mr. Hartfield: They could hold us on the guarantee, on the instalment of the interest due, but that is no solution of the problem, because it would come up every six months and no one knows how long this moratorium is going to be in effect. What I want to impress upon your Honor is that you take a large number of these bonds and certificates; they are held by insurance companies and banks who do not want the property, who do not want the title to the property; it has been suggested to you that we could divest ourselves of the stock because they cannot hold a bond; they want to hold real estate. What they want is to have the property adequately managed and to have the claim for the interest that is forgiven added to the claim so that at the end it is cumulative and nothing can be received by the equity holders until these instalments of deferred interest are made up. In other words, this is an arrangement which we are proposing to enter into at the request

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of a large number of the holders of these certificates who do not want to have this property foreclosed. The situation here is altogether different from the case if there was a reorganization attempted, and the argument that is made as to the Day & Meyer case would be and can be presented in the Burchill proceedings. It can then be determined whether or not the court will adopt that rule, but, you see, we are offering the certificate holders something they have not got. If they did go ahead and take the property under the Burchill—

The Court: What is it that they haven't now?

Mr. Hartfield: We are making an absolute agreement to which the State moratorium law has no application because even if the other reorganization is not made effective, even if the courts hold that we cannot put this extension into effect with the consent of the large number, both in amount and number of bondholders—we are making here an independent agreement that, irrespective of whether or not there is any liability under the New York State Moratorium Act, and irrespective of whether the Burchill reorganization becomes effective, we guarantee and our guarantee remains in effect free from defect and free from any defenses. We have no moratorium law, not only for this fixed rate of three per cent but there is added to it at the end of it this provision for cumulative interest. Now, for anybody to say that is not giving up something, it is just distorting language because there is a real abandonment of defenses. Now of course it may be true that there are fifty people who can run these two buildings as well as our company, but the great majority of the certificate holders do not think that is the fact. They think that the years of experience that this company has had in the management of these two properties

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—and were universally successful up until 1934—are sufficient, and anybody that does not recognize what has happened to real estate values in lower New York, in the financial district, in the last few years, just has not got the sight of a nine-day old puppy, because, as everyone knows, that knows anything about the situation, the conditions are altogether changed, and that despite the fact that these companies were well and successfully managed so that interest was paid in full for 19½ years, the income has materially shrunk, and it is not unique to these buildings.

Now, I liked your Honor's suggestion that you have Mr. Flohr, the treasurer of this company, take the stand and detail the origin of these buildings, the income of them over the periods, and the present incomes, and will show the reasons why we are proposing at the instance of a large number of certificate holders this arrangement, and I believe that when you have heard it even Mr. Rickaby, and all of the others, will say it is a much better arrangement than any suggestion that the certificate holders stand strictly upon their rights and take the property and run the risk of bringing a suit every six months upon instalments of guaranteed interest, that they do not collect from the property, and I believe the minute they foreclose and take over the property—and if we are right about the value of it under the moratorium law—they could not even collect the interest instalments from us because there would be no basis for any deficiency there at all.

The Court: Tell me, the plan contemplates that your guarantee will continue, but in a modified form.

Mr. Hartfield: Right.

The Court: Deferring until the end of the ten-year period of extension the payment of any interest. That is deferred

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under the certificates until that time, is that right, whether that interest amounts to $1\frac{1}{2}$ per cent or $2\frac{1}{2}$ per cent?

Mr. Hartfield: It is one per cent for the first five years and two per cent for the next five years, and that is cumulative and is added to the principal so that if it is not earned it is not paid. The property will eventually have to reduce that before anything can possibly be obtained for anybody else.

The Court: What I want to know is this: is the interest definitely reduced to three per cent?

Mr. Marx: Fixed.

The Court: Plus one per cent.

Mr. Hartfield: Plus one per cent for five years and then plus two per cent for the next five years, if earned, and that contingent income interest is made cumulative and is added to the balance, you know, the principal of the guarantee at the due date.

The Court: And that is what you guarantee?

Mr. Hartfield: Yes, sir. The principal is \$3,710,000 plus, in effect, 4 per cent interest for five years, and five per cent interest for the balance.

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Mr. Rickaby: May I say this to your Honor, just in answer to what Col. Hartfield said that I used those same arguments that he made in the Barclay case, but the Circuit Court of Appeals would not let me get away with it, and there were \$19,000—

The Court: Yes, that is where they tried to give something to stockholders.

Mr. Rickaby: That was a hotel. They kept their stock.

The Court: When they were reducing the interest.

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Mr. Hartfield: Not only reducing the interest but a large part of the principal.

The Court: And also the principal.

Mr. Hartfield: And here there is no reduction in principal at all.

Mr. Rickaby: They were not doing that there.

The Court: There is another point in this case, Col. Hartfield, that is probably different, and that is this: here we have a debtor, the United States Realty & Improvement Company. Are you satisfied that under this statute you can make an adjustment, or an arrangement of a single obligation of the debtor?

Mr. Marx: The statute provides specifically, your Honor, that the Court may fix the division of creditors into classes.

The Court: I know, but it must be a division. It is not just an arbitrary division.

Mr. Bardusch: If I may show your Honor—

The Court: I have it here.

Mr. Marx: This is the sole unsecured debt of the company. It is section 351.

The Court: Oh, yes.

Mr. Hartfield: Yes, your Honor.

Mr. Marx: And then there are further provisions in the Act, your Honor, about creditors who are affected by the arrangement and who are not affected by the arrangement. Those not affected by the arrangement, their consent not being necessary to the confirmation.

The Court: Well, I think you have given me the answer. This is the sole unsecured obligation of the debtor.

Mr. Hartfield: That is right.

Mr. Marx: That is of the funded debt, your Honor.

Mr. Rickaby: Except the \$6,000, and may I say this to

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your Honor, that Col. Hartfield remarked about the banks and insurance companies liking this plan and wanting to do that, and that there were a great majority of them. If the plan is unfair it does not make any difference if ninety per cent of the creditors like it. It has got to stand the test of fairness, and the ninety per cent cannot give away property of the ten per cent.

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The Court: We will give due consideration to it.

Mr. Bardusch: If your Honor please, right in the plan and the financial statements annexed to the plan which they have supplied to us, it appears there that in the year 1936 the debtor—not the debtor but Trinity Buildings Corporation—earned over four per cent; in the year 1937 it earned 47½%, and in the year 1938 which is down to date practically, earned over 4 per cent, and yet they are proposing a guarantee of three. As I understand from—

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The Court: No, three plus if earned.

Mr. Bardusch: Oh, yes, but that one per cent is in the future and cannot be presumed to be better than the guarantee we have today. Realty does not put up a nickel for ten long years.

Mr. Marx: We will show that later.

The Court: Counsel, I would rather have the cash money than all the guarantees that you could hand me. Now it is the same way here.

Mr. Bardusch: Precisely.

The Court: Three per cent plus one, if earned.

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Mr. Bardusch: Yes.

The Court: You get the one per cent if earned. Who cares about a guarantee if you get it? If it is earned that is what you are interested in. If I had any of the certificates I would be more concerned about whether they earned it.

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I do not care about the guarantee.

Mr. Bardusch: But aren't you interested about the conditions, whether they can meet this guarantee of interest, not merely the earnings of Trinity?

Mr. Marx: Your Honor, we are prepared to call Mr. Flohr to the stand.

Mr. Rickaby: Mr. Flohr won't know all that. All that it is preventing a suit for the interest. We have requested the trustee to sue for the interest, and then the injunction in this proceeding came along and precluded that suit. That is the only reason the suit is pending for the interest.

The Court: Well, that is the reason I have these proceedings.

Mr. Hartfield: I think, if your Honor please, we would like to call Mr. Flohr to put in the income and earnings for five years and an estimate of what we are going to get the next two years, and then give those figures to any of these committees that are here, so that when we resume, the examination may be shortened and they will have that information, and it would take a very short time to do that.

The Court: All right, call him.

ARTHUR J. FLOHR, called as a witness on behalf of the debtor, being duly sworn, testified as follows:

Direct Examination by Mr. Hartfield:

Q. Mr. Flohr, what is your business? A. I am vice-president and treasurer of the United States Realty & Improvement Company.

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Q. And how long have you been connected with that company? A. Oh, over thirty years.

Q. And as treasurer of the company do you have custody of the books and records of the company, and particularly the financial records of the company? A. Yes, sir.

Q. How long have you been connected with the treasurer's office? A. Oh, twenty years or so.

Q. You are familiar with the property of the Trinity Buildings Corporation in New York? A. Yes, sir.

Q. Describe briefly the properties owned by that company.

A. Why, they are two office buildings at 111 and 115 Broadway, fireproof, steel and limestone buildings; 21 stories, with rentable areas: The Trinity Building of approximately 270,000 square feet, and the U. S. Realty Building of approximately 248,000 square feet.

Q. Were the buildings built at the same time? A. No. Part of the Trinity Building was built in 1905, as an addition to the Trinity Building, and the United States Realty Building was built in 1907.

Q. The Trinity Building is the one at 111 Broadway? A. 111 Broadway.

Q. And the United States Realty Building is 115 Broadway? A. Yes, sir.

Q. When were these two buildings conveyed to the Trinity Buildings Corporation of New York? A. In June, 1919.

Q. In June, 1919, did the Trinity Buildings Corporation deliver to the Guaranty Trust Company a first mortgage on these two buildings? A. Yes, sir.

Q. And what was the principal amount of the bonds outstanding in June, 1919? A. \$7,000,000.

Q. And what is the amount of those bonds now outstanding? A. \$3,710,500.

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Q. And in what manner has the mortgage been reduced from \$7,000,000 to \$3,710,000? A. By payments into a sinking fund of which the Guaranty Trust Company was the trustee, and through that sinking fund purchases of the bonds.

Q. Do you recall the execution of the share certificates in 1919? A. Yes, sir.

Q. What was that transaction? A. The mortgage was given to the Guaranty Trust Company for \$7,000,000 who in turn issued share certificates in such mortgage. These share certificates were sold to the United States Realty & Improvement Company, who in turn sold them to the National City Company and at the same time gave to the Guaranty Trust Company a guarantee of the provisions of the mortgage and the certificates.

Q. Were these certificates with this guarantee of the United States Realty & Improvement Company, the debtor, sold by the National City Company to the public? A. I believe they were.

Q. Does the Trinity Buildings Corporation owe the debtor, the United States Realty & Improvement Company any unsecured indebtedness at this time? A. Yes, sir.

Q. What is the amount of that indebtedness? A. The amount is \$10,442,482.99.

Q. As of what? A. As of May 31, 1939; \$8,781,192.44 in the form of a note that was part of the consideration at the time of the conveyance of the property to the Trinity Buildings Corporation, and \$1,661,290.55 on open account, accumulated since then.

Q. Have the real estate taxes on these properties, 111-115, been paid? A. Yes, sir, they have been paid to date.

Q. Up to what date was interest paid on these \$3,710,500

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of outstanding share certificates? A. Up to December 1, 1938.

Q. Has the principal which on the face of the bonds was due on June 1, 1939, or the interest which was due on that date, been paid? A. No, sir.

Q. Are you familiar with the operation of these buildings during the period from 1919 down to date? A. Yes, sir.

Q. Take the period up to the close of the year 1934. Was the income from the building sufficient to pay the interest and sinking fund requirements? A. Yes, sir.

Q. And was there also a substantial sum left for the equity? A. Yes, sir.

Q. What is the total of the semi-annual interest payments that have been made up to December 1, 1938, on this mortgage? A. The total payments of semi-annual interest and quarterly payments—quarterly sinking fund payments—

Mr. Rickaby: How is that material, the aggregate of interest? What has that got to do with it?

Mr. Hartfield: Well, we want to show what was done with the money.

Mr. Rickaby: I do not see the materiality.

Mr. Hartfield: It won't be long.

The Court: Go ahead.

A. \$8,777,830.68.

Q. How is that divided as between interest and sinking fund payments? A. Well, there was paid by the trustee on interest payments aggregating \$5,501,402.42, and there were share certificates purchased and retired in the amount of \$3,289,500.

Q. During this period was any interest paid on the in-

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debtedness due from the Trinity Buildings Corporation to the debtor, the United States Improvement & Realty Company? A. Yes, sir.

Q. How much was the total of those payments made on account of interest by the debtor to the United States Realty & Improvement Company?

The Court: By the Trinity.

Mr. Hartfield: By the Trinity Buildings Corporation to the debtor.

A. The total amount was somewhat in excess of \$11,000,000.

Q. How much of that was on account of interest? A. It was all on account of interest.

Q. Now, commencing with the year 1931 what was the situation with respect to the rental income from the buildings? A. Why, it began to fall.

The Court: What year was that?

The Witness: 1931.

Q. What was the percentage of occupancy up to 1931 in the Trinity Building? A. Well, I can't answer up to 1931, but in 1930 the Trinity Building was occupied 95.75 per cent.

Q. What was the average rent you were getting then per square foot? A. The average rate per square foot was \$4.80.

Q. And what was the situation of the United States Realty Building in that year? A. In 1930 the United States Realty Building was occupied 96.93 per cent.

Q. What was the average rate? A. At an average of \$4.32 per square foot.

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Q. Now take May 1, 1939: What is the occupancy of the two buildings, both in percentage and realization per square foot? A. The Trinity Building was 68.32 per cent occupied at an average rate of \$2.31 per square foot, and the Realty Building was 79.33 per cent occupied, at an average rate of \$2.01 per square foot.

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Q. What was the total rent roll of the Trinity Building on May 1, 1939? A. \$428,206.

Q. And what was it on the United States Realty Building? A. \$396,079.80.

Q. What does that make the total rent roll of both buildings? A. \$824,285.80.

Q. Now, in this rent roll is any part of it covered by leases which are about to expire and which can not be, in your opinion, renewed at the present rates specified in the leases? A. Well, of the rent roll approximately \$32,000 is covered by leases which you might say are on a more or less temporary basis that might be—and we expect to be—cancelled almost any time. Of these, of this \$32,000, we have already received cancellations effective between the 1st of May and the end of July approximately aggregating \$18,000. There is also a lease or leases to one tenant which expire on May 1, 1940, at an annual rental of \$68,000. That is an average rate greatly in excess of the present market rates. This lease will undoubtedly have to be renewed in 1940, if it is renewed, at a greatly reduced rate and possibly we may have to make some concession for the balance of this period in order to make such renewal.

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Q. Have you prepared a schedule showing the gross income of Trinity Buildings Corporation of New York, the amount of real estate taxes, the interest on the mortgage, the operating and maintenance expenses, the depreciation and

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the result of the operations for the last five years? A. Yes, sir, except that I haven't it with depreciation.

Q. But you have it with all the other items except depreciation? A. All the other items.

Mr. Hartfield: I will ask to have this schedule marked in evidence, and I will give a copy of it to any of the gentlemen present who asks for it.

Mr. Rickaby: Does it cover each year separately?

Mr. Hartfield: Yes; 1934 down to and including 1938 separately.

(Marked Debtor's Exhibit 1.)

Q. Now going back again: Looking at this statement of real estate taxes, what were the premises assessed at by the City of New York for the year 1938? A. They were assessed at \$11,225,000 for 1938.

Q. And how much taxes did you pay? A. Taxes were \$328,892.50.

Q. And what were the premises assessed at for the year beginning July 1, 1939? A. They were originally assessed at \$11,175,000.

Q. Did you make an application for a reduction of the assessment? A. Yes, sir.

Q. And did you obtain any reduction? A. Yes, sir. We got a reduction to \$10,500,000.

Q. And what will be the taxes payable for the year beginning July 1, 1939? A. \$309,750.

Q. Commencing with the years 1936, 1937 and 1938, was the total gross income equal to the real estate taxes, interest on the first mortgage and the operating expenses, leaving out depreciation? A. They were not.

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Q. How much were they short for the year 1936? A. \$51,757.07.

Q. And how much for the year 1937? A. \$20,782.93.

Q. And how much for the year 1938? A. \$51,546.88.

Q. Now, if you add to that a depreciation in amount allowed by the government, the usual charge, would that increase the amount of these losses? A. Yes, sir.

Q. Now take the period for the six months ending May 1, 1939. How much has been earned toward the payment of interest? A. \$37,914.83.

Q. And what was the interest that was due for that six months? A. Around \$102,000.

Q. In round figures it was about \$102,000? A. Yes, \$102,000.

Q. Take the six months' period; have you prepared a statement showing the gross income, the real estate taxes and the other operating and maintenance expenses, and showing the balance available for this amount of interest due of \$102,000 approximately? A. Yes, sir.

Mr. Hartfield: I will ask to have this statement marked as debtor's exhibit 2, and I will furnish a copy to the gentlemen who wish it,—that is, the six months' statement.

(Marked Debtor's Exhibit 2.)

Q. Now, during the summer of 1937, and in November, 1938, did the Trinity Buildings Corporation and the United States Realty & Improvement Company attempt to secure a mortgage to provide funds to equal these outstanding certificates of \$3,710,000? A. Yes, sir.

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Q. Were those efforts successful or not? A. No, sir, they were not.

Q. Without going into all the details, do you know one institution to which an application was made? A. The East River Savings Bank. We made an application for a loan of \$3,800,000.

Q. Did you supply them with figures showing the earnings for the prior years and for the current year and other information? A. Yes, sir.

Q. Relating to expiration of leases, the names of tenants and the physical condition of the properties? A. Yes, sir. We supplied them with all of that information.

Q. Have you applied to the R. F. C. for a loan? A. Counsel applied to the R. F. C. in 1938 for a loan, without success.

Q. And none of your efforts to obtain a mortgage loan, to refund these \$3,710,000 of outstanding certificates have been successful? A. No, sir.

Q. Now, have you prepared an estimate of the earnings of the Trinity Buildings Corporation of New York available for interest for the thirteen months ending December 31, 1939, and for the calendar years 1940 and 1941? A. Yes, sir.

Q. What was the basis upon which you prepared those earnings? A. I estimated the earnings of the Trinity Buildings Corporation available for interest, basing it upon the actual earnings for the six months ended May 31, 1939, and an estimate for the seven months ending December 31, 1939.

Q. In preparing this estimate for the seven months did you base it on the present rent roll? A. Yes, sir, I based it on the present rent roll and on the basis of an adjustment for rent to a tenant whose lease expires on April 30, 1940, and about whom I spoke a few minutes ago.

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Q. Did you make any allowance for the expenses in this proceeding? A. No, sir.

Q. This lease that you referred to, did you tell us that in your opinion it was in excess of the present market value of this space? A. Yes, sir.

Q. How did you estimate the operating and maintenance expenses? A. The operating and maintenance expenses for the six months gone by are of course the actual, and those for the other seven months for the 13 months' period are based on the expenses for a similar period of a previous year.

Q. What did you do about taxes? A. I based taxes on the assessed valuation, the present assessed valuation, and the present tax rate.

Q. What did you do about the interest requirement under the amended plan which is being offered here? A. Well, the estimate that I prepared is designed to show how much will be earned on account of the interest under the amended plan.

Q. What will be the fixed interest, the three per cent fixed interest requirement under the amended plan for this period of 13 months? A. \$120,591.25.

Q. That is for each year? A. No, that is for the thirteen months.

Q. For the 13 months? A. For the two subsequent years. It would be \$111,315 in each year.

Q. And how much did you estimate would be available for the years ending December 31, 1940 and December 31, 1941 towards paying the fixed interest of approximately \$111,000 a year?

Mr. Rickaby: That is objected to as being no proof of the fact. It is purely a guess.

Mr. Hartfield: Well, he just stated how he arrived at the estimate.

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*Meeting of Creditors before Judge Leibell—June 28, 1939
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The Court: It is the estimate of a man who has been in charge of the property and certainly had something to do with it for the last twenty years.

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A. My estimate for the 13 months ending December 31, 1939, is that there will be \$85,000 available for such interest, and for each of the years ending December 31, 1940, and December 31, 1941, \$61,900 in each year.

Q. In making up this estimate of \$61,900 for each of these two years, what did you assume with respect to the rent rolls? A. I assumed that the rent roll would be the same as the May 1, 1939 rent roll with certain adjustments, for temporary leases, and for this lease that expires soon.

533

Q. What did you do about the operating and maintenance expenses? A. I used the operating and maintenance expenses on the basis of the last full years' operating and maintenance expenses.

Q. Now, assume that this amended plan became effective, how much would the U. S. Realty & Improvement Company, the debtor, be called upon to make good the deficit for the thirteen months ending December 31, 1939? A. Approximately \$35,000.

Q. And how much would they be called upon to contribute for each of the years 1940 and 1941? A. \$49,000 in each year.

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Q. And that is your best estimate of what this debtor will have to be out of pocket if it makes good on its guarantee under this amended plan? A. Yes, sir, it is.

Q. Have you prepared a statement showing the estimated net income of Trinity Buildings Corporation of New York City for the three years and one month ending December 31, 1941, available for payment of interest? A. Yes, sir.

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Q. Is this the statement which you have prepared? A. Yes, sir, it is.

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Mr. Hartfield: I offer it in evidence, and I will furnish a copy of that to anyone who tells us that they want it.

(Marked Debtor's Exhibit 3.)

Mr. Hartfield: Now, your Honor, I think that is a good place to stop. We have got something else. Of course we want to put in these formal documents,

The Court: What is the last paper?

Mr. Hartfield: This is an estimate, you know, of the income of Trinity Buildings Corporation for the three years and one month ending December 31, 1940, showing the amounts available for payment of interest.

536

My attention has been called to one question where I may have misled you.

Q. With respect to the R. F. C., as I understand it, counsel discussed that with the R. F. C. but no formal application was filed. Is that your understanding? A. Yes, sir, that is my understanding.

The Court: Now the cross examination of this witness will take place on July 7th.

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Mr. Hartfield: May I ask one more question of the witness?

The Court: Yes.

*Meeting of Creditors before Judge Leibell—June 28, 1939.
Arthur J. Flohr—for Dehtor—Direct.*

By Mr. Hartfield:

538 Q. I asked you what the United States Realty & Improvement Company would commit itself under this guarantee and would be out of pocket, and you gave us certain amounts for the year 1939 and also for the years 1940 and 1941. Did that computation include any of the amounts that were under the amended plan to be added to the principal at the end, if the contingent interest over and above the fixed interest was not earned and paid? A. No, sir, it did not. It allowed only for the fixed interest of three per cent.

539 Q. So in computing the obligation incurred by the United States Realty and Improvement Company and to be contributed by it, you must add this one per cent for the first five years and two per cent for the next five years? A. Yes, sir.

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(Adjourned until Friday, July 7, 1939, at 10.30 a. m.)

**Adjourned Meeting of Creditors before Judge
Leibell—July 7, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy No. 74,023.

541

[SAME TITLE]

Before:

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 7th, 1939;

10:30 o'clock a.m.

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A P P E A R A N C E S :

WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph M. Hartfield, Esq., &

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.

Attorneys for Ralph W. Earl and

Donald M. Halsted, as member

of Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee
of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

*Adjourned Meeting of Creditors before Judge Leibell—July
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Statement.

DAVIS, POLK, WARDWELL, GARDINER & REED,

Esqrs.,

Attorneys for Guaranty Trust Company
of New York, as Trustee;

J. Howland Auchincloss, Esq., of Counsel.

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a
creditor.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate
holders.

JAMES L. BARGER, Esq.,

Attorney, appearing for himself.

VINSON KRISTELLER & SWIFT, Esqrs.,

Attorneys for R. Gilbert Jackson;
Frederic W. Dillingham, Esq., of Counsel.

J. A. PANUCH, Esq.,

Attorney for Securities & Exchange
Commission. Amicus Curiae;

Samuel H. Levy, Esq., and

George Zolotar, Esq., of Counsel.

HENRY BEST, Esq., Attorney for Estate of Miner Tonnelle.

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Mr. Rickaby: I ask your Honor's leave to file objections
to the plan here, copy of which has been served on counsel for
the debtor.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

The Court: Yes; but I wish to announce that before you file your objections, I have not approved of the application for intervention by the various committees because there is a question in my mind as to whether, under Chapter XI of the Chandler Act, and this is a proceeding under that chapter, any committee can be recognized except a committee that is elected at the first meeting of creditors.

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I am going to hear you all as friends of the court until you convince me that I have the right, under the provisions of the Act, to permit these three creditor committees to intervene. I would like to be able to do it, if I can. At any rate, I intend to hear you and I will extend your time to file objections until I formally dispose of your applications for leave to intervene. I will let you file these objections informally, so they are before the Court, as representations made by these various committees in the capacity of *amicus curiae*.

548

Everybody will be heard, but from what I have been able to gather, in looking at Chapter XI, I doubt whether any committee has any standing except a committee elected at the first meeting of creditors. There are two opinions in this court, you know, written on that subject. Of course, they relate to allowances but they also cover generally what the procedure should be under Chapter XI. Of course, under Chapter X, which related to a reorganization, where secured obligations of the debtor are being reorganized, they have very similar provisions to what they had under 77B of the old Act, and various committees may be recognized as committees to intervene; but under Chapter XI, which is supposed to be the simplest kind of proceeding, there is only one committee that it indicates.

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Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Mr. Rickaby: It would make very little practical difference, your Honor, whether we spoke in behalf of a committee or whether we spoke in behalf of—

The Court: It makes a difference, and the word practically, as you use it, applies to one or two reasons why it would make a difference. It is very practical as to whether or not I can make an allowance to a committee. That is No.

Apparently under Chapter XI the only committee to which the Court could make an allowance in this proceeding is a committee elected at the first meeting of creditors. Judge Patterson so ruled.

Mr. Rickaby: So far as I am concerned, that is not a matter of primary interest here.

The Court: That may be true of all, as well as yourself, but, nevertheless, we have to look ahead. That is one reason. The other reason is this, that these committees have been selected, some of them in advance of the proceeding itself, and there is not any provision for any such committee under Chapter XI. Chapter XI was supposed to cover the simplest kind of arrangement by an ordinary debtor who had practically nothing but unsecured creditors.

Mr. Rickaby: It is to reorganize a delicatessen store, practically.

The Court: Well, it would relate, I should say, to simply matters of adjustment of obligations of the average small business man.

Mr. Rickaby: Small business man, of course.

The Court: And the report of the committee so indicates, that it was intended for that purpose. However, from what I have been able to see, from the papers in this case, it would appear that the present debtor could at least technically

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

qualify under the provisions of Chapter XI. I will hear argument on that later from the three committees. I will so state on the record. The so-called Trinity Buildings Corporation Bondholders Committee, headed by Mr. James A. Beha, and represented by Simpson, Thacher & Bartlett, will be heard as a friend of the Court in this proceeding. Likewise, the so-called Earl Committee, headed by Ralph W. Earl, and represented by William E. Bardusch, will be heard as a friend of the Court in this proceeding. So also the committee headed by Peter Grimm, and represented by Ralph M. Arkush, will be heard in like capacity. The Securities & Exchange Commission, when their representative called upon me, directed my attention to certain objections that they thought existed to the proceeding. I told the representative to communicate with the other attorneys and serve them with a memorandum. Has that been done?

Mr. Panuch: Your Honor, I have here the memorandum and notice which were served on the four amicus curiae committees, with proof of service, which I would like to hand up to you.

The Court: You wish to appear in that capacity in this proceeding?

Mr. Panuch: Yes, your Honor.

The Court: Under Chapter XI it does not appear that the Securities & Exchange Commission is a necessary party or that notice must be given, but I will permit you also to be heard in the capacity of a friend of the Court, the same as the three committees.

Is there anyone else who would like to obtain some representation here?

We have three committees and we have the Securities & Exchange Commission.

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*Adjourned Meeting of Creditors before Judge Leibell—July
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Arthur J. Flohr—for Debtor—Direct.

Mr. Brozan: If your Honor please, on my application—

The Court: That is right, yesterday. You represent two bondholders?

Mr. Brozan: Yes, sir.

The Court: And I denied your application for leave to intervene, but I told you that you might attend and would receive notice of all hearings and that you would be given an opportunity to be heard, but I cannot recognize every attorney, who represents two or three bondholders because, as I explained to you in chambers, we would never finish with the proceeding, if that were the case, but any matter that you think should be called to the attention of the Court, you may present.

Mr. Dillingham: May I have the same leave? I represent one bondholder.

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ARTHUR J. FLOHR, resumed the stand, testified further as follows:

Direct Examination by Mr. Hartfield (Continued):

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Q. Mr. Flohr, attached to this amended modification plan and agreement dated May 1, 1939, at pages 12 and 13 thereof, is a balance sheet. Have you that before you? A. I believe I have one somewhere. Oh, I have it.

Q. I want to ask you this: Is that a balance sheet as certified by the auditors of the company as of December 31, 1938, of the United States Realty & Improvement Company, the debtor corporation? A. Yes, sir.

*Adjourned Meeting of Creditors before Judge Leibell—July
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Arthur J. Flohr—for Debtor—Direct.

Q. I would like to have you, if you will, take for the benefit of those present the items appearing on the assets side of that balance sheet and explain each one of the items.

559

The Court: Will you take it for me (indicating)?

The Witness: I do not believe it is in here (indicating). Oh, here it is.

The Court: All right, thank you.

Q. Have you answered the question, is that the balance sheet as found to be correct by the auditors employed by the company as of December 31, 1938, of the debtor, the United States Realty & Improvement Company? A. It is.

560

Q. Have there been changes in that balance sheet between December 31, 1938, and June 1, 1939? A. Yes, sir.

Q. Will you give us the figures of each item as of June 1, 1939, following that balance sheet? Take the first item, cash. What was the balance of cash on June 1, 1939? A. \$335,095.32.

Q. With the exception of some little sums in postage stamps, petty cash, were all those balances on deposit with banks in the City of New York? A. Yes, sir.

Q. Take the "Accounts, notes, accrued interest and dividend receivable." What was the amount of those as of June 1, 1939?

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A. Do you want that figure as of June 1, 1939?

Q. Yes. A. That amount is—

Q. Have you prepared a pro forma estimated balance sheet as of June 1, 1939, after giving effect to certain valua-

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Arthur J. Flohr—for Debtor—Direct.

562 tions that you put upon the assets shown upon the balance sheet? A. Yes, sir.

Q. Is that paper you have before you that pro forma balance sheet? A. This is it, yes, sir.

Mr. Hartfield: I would like to have this now marked for identification. I will offer it later in evidence, if I may.

(Marked Debtor's Exhibit 4 for identification.)

563 Q. Can you, by looking at this Debtor's Exhibit 4 for identification, tell us what the accounts receivable and accrued interest receivable were as of June 1, 1939? A. Yes, sir, miscellaneous accounts receivable amount to \$3,515.07, and interest accrued on investments amount to \$55,469.73, all of which are good and collectible.

Q. What do you make the aggregate of those two amounts? A. \$58,984.80.

Q. What do you make the total of current assets, as of June 1, 1939, of the debtor? A. \$394,080.12.

564 Q. Is the explanation of the reason why the accrued interest is so much larger as of June 1, as compared with December 31, that five months of the six months period had expired on June 1 while as of December 31 it was at the end of an interest period? A. That would be generally so, yes, sir.

The Court: What about that item of \$175,000, Plaza Operating Company, 4 per cent, shown on page 12?

The Witness: That was subsequently renewed, your Honor, and now is not current.

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Arthur J. Flohr—for Debtor—Direct.

The Court: It appears as an asset elsewhere?

The Witness: Yes, sir, right below, \$137,500, on your little green sheet.

Mr. Hartfield: I will take that up in order, your Honor, if that is agreeable.

Q. As I understand it, that item that appears on sheet 12, notes receivable, Plaza Operating Company, is no longer a current asset, is that correct? A. That is right.

The Court: While you are on it, explain why that is.

Mr. Hartfield: Let me take it up. I pledge you I won't skip it but I would like to take it up in the order in which these appear on the balance sheet.

Q. The next one, sinking fund deposit. That remains the same, does it \$60.14? A. Yes.

Q. When we come to investments in and advances to subsidiaries, in the printed balance sheet it shows an aggregate for this account of \$20,428,489.04, is that not correct? A. Yes, sir.

Q. In Debtor's Exhibit 4 that has been reduced to \$5,337,875. Is that true? A. Yes, sir.

Q. Will you take each item which appears under that investment in and advances to subsidiaries, and explain just what change has been made in each item and the reason therefor? A. The first item of Trinity Buildings Corporation represents note, open account and stock of that corporation held by the debtor.

Q. Of that aggregate of \$11,442,482.99, how much of it was stock? A. \$1,000,000.

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7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

568 Q. So if you deduct \$1,000,000 from \$11,442,482.99, which represents \$10,442,482.99, you have the amount due the debtor from the Trinity Buildings Corporation, the owners of 111 and 115 Broadway, either upon note or upon moneys advanced to it; is that right? A. That is right.

Q. Why have you listed this indebtedness or investment of \$11,442,000, in round figures, as without value on this Exhibit 4 for identification? A. Well, for the reason that it seemed in view of this proceeding it would be very hard for us to realize anything on that investment, and it is our opinion that we could not at this time.

569 Mr. Bardusch: I object to that. They have not qualified this witness to give opinions on value here.

The Court: We will take it subject to cross-examination.

Q. Mr. Flohr, how long did you say you have been connected with the debtor? A. Over 30 years.

Q. What has been the business of the debtor during that period? A. Real estate business.

Q. Have you during all that period of 30 years had to do with real estate and real estate values, particularly in New York City? A. Yes.

570 Q. What has been your particular function with the company? A. Well, for 20 years I have been associated with the financial end of the company.

Q. In connection with the financial affairs of the company? A. Yes.

Q. Was it necessary for you to be familiar with the income and the expenses of operation of the various parcels of real property owned by the company or its subsidiaries? A. Yes.

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Arthur J. Flohr—for Debtor—Direct.

Q. Have you during that time kept informed of the current rentals that were obtainable from properties in the City of New York—those owned by the debtor or its subsidiaries?

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A. Yes, sir.

Q. And with the expenses of operating properties of the kind such as 111 and 115 Broadway and the other properties owned by the debtor or its subsidiaries?

A. Yes, sir.

Q. Take the next item, Lawyers Building Corporation, \$1,309,059.46. What does that represent? A. That represents a note of the Lawyers Building Corporation of \$1,274,059.46, advances on open account of \$25,000 and 100 shares of the capital stock of the corporation, carried on the books at \$10,000.

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Q. What properties did the Lawyers Building Corporation own? A. The Lawyers Building Corporation is the owner of an office building in Boston, Massachusetts.

Q. Is there any mortgage on that building? A. There is a \$670,000 mortgage.

Q. What rate of interest? A. 4 per cent per annum.

Q. At the present time will you tell the Court whether or not the earnings of the Lawyers Building Corporation, this piece of property in Boston, are sufficient to meet the interest requirements of the mortgage and the taxes on the property? A. No, sir, they are not.

Q. By what amount do the present earnings on this building in Boston fail to earn the interest and the taxes and carrying charges upon the property? A. For the 12 months ended December 31, 1938, they failed to earn the interest and taxes by \$4,300. That is before the deduction of any depreciation.

Q. So that if depreciation was added, the amount of \$4,000

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Arthur J. Flohr—for Debtor—Direct.

plus would be increased by the amount of the depreciation?

A. Yes.

Q. In view of the fact that the property fails to earn sufficient to pay taxes and interest, what have you, upon Debtor's Exhibit 4 for identification, put the value of this investment in the Lawyers Building Corporation? A. At no value.

Q. Based upon your experience do you believe that the interest of the debtor in the Lawyers Building Corporation could be disposed of for any sum at this time? A. No, sir, I do not believe it could.

Q. Take the next item, G. A. F. Realty Corporation, \$500. Will you tell us what that is? A. That is an investment of the stock of the G. A. F. Realty Corporation, now inactive, that has no assets other than a small amount of cash.

Q. I don't want to spend much time on it. On Debtor's Exhibit 4 for identification you have reduced that \$500 to \$375. Why is that? A. That is the amount of cash in the bank.

Q. With the exception of that cash, you state to the Court that the debtor cannot realize anything upon this investment in the G. A. F. Realty Corporation or its obligation due from that company? A. Yes.

Q. Do you state to the Court that the \$375 represents the full amount that can be realized either from the obligation or investment in that corporation by the debtor? A. Yes, sir.

Q. Take the next item, Whitehall Improvement Corporation, including mortgage receivable of \$4,000,000 pledged to secure note payable of \$3,000,000, \$7,676,445.59. What does that represent? A. Represents a mortgage of \$4,000,000. A note—

Q. Before you go to the note, tell us about that mortgage. What property does that cover? A. Covers the Whitehall Building.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Q. That Whitehall Building is the big building located at 17 Battery Place? A. Yes, sir. 577

The Court: Is that a first mortgage?

The Witness: First mortgage.

Q. That is a first mortgage of \$4,000,000. Does the debtor have that mortgage in its vaults? A. It is pledged to secure a loan of \$3,000,000, a bank loan of \$3,000,000.

Q. That is a loan of the debtor to what bank? A. National City Bank.

Q. When does the note that the debtor has given to the National City Bank become due? A. On August 12, 1939. 578

Q. How long a mortgage is this \$4,000,000 mortgage, which the debtor held on the Whitehall Building and which it assigned as collateral for this \$3,000,000 indebtedness which it owes to the National City Bank? A. It is a mortgage due 90 days after demand.

Q. Who holds title to the Whitehall Building at 17 Battery Place? A. Whitehall Improvement Corporation.

Q. Is that a wholly owned subsidiary of the debtor? A. Yes, sir.

Q. What is the rate of interest upon this \$4,000,000 mortgage of the subsidiary, Whitehall Improvement? A. Six per cent per annum. 579

Q. And that produces, if my mathematics are correct, \$240,000 a year? A. Yes.

Q. Out of that \$240,000 how much are you now paying the National City Bank on account of interest on your \$3,000,000 note? A. \$120,000 per year, approximately.

Q. Are you able to sell or dispose of this \$4,000,000 mort-

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gage without paying off your \$3,000,000 note to the National City Bank? A. No, sir.

Q. Describe briefly this piece of property at 17 Battery Place. A. It is a 32-story, fireproof, brick and limestone office building, with a rentable area of approximately 545,000 square feet. It is on a parcel of real estate the area of which is approximately 65,000 square feet. The real estate is not entirely covered by the building.

Q. Has this building been recently appraised by the real estate firm of Brown, Wheelock, Harris & Stevens, Inc., I think the name of it is now. A. Yes, it has.

Q. What did they appraise this property at? A. At \$5,250,000.

Q. In addition to the \$4,000,000 mortgage pledged to secure the \$3,000,000 note, do you hold any note of this subsidiary that owns 17 Battery Place, the Whitehall Improvement Corporation? A. Yes, sir.

Q. How much is that note? A. \$3,675,945.59.

Q. What was the maturity of the note? A. That note matured on June 30, 1939, but will be extended.

Q. What rate of interest does that note bear? A. 2 per cent per annum up to June 30, 1939.

Q. How much income did you get from that note? A. At the rate of \$73,500 per annum.

Q. Based on your own opinion of the value of this property and this appraisal of Messrs. Brown, Wheelock, Harris & Stevens, Inc., what would be the value of this note of \$3,675,945.59 as of June 1, 1939? A. Based on the appraisal, this note would have a value of approximately \$1,200,000.

Q. How many shares of stock, being all the stock of this Whitehall Improvement Corporation, does the debtor own? A. 5 shares of par value of \$100 each.

*Adjourned Meeting of Creditors before Judge Leibell—July
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Arthur J. Flohr—for Debtor—Direct.

Q. How much was that stock carried on the book of the company as of December 31, entering into the total figure of \$7,676,000 plus? A. I would say that had no value.

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Q. I mean, how much was it carried on the books at? A. \$500.

Q. You said the stock has no value. Does it produce any income? A. No, sir.

Q. Turning to Debtor's Exhibit 4 for Identification, you have on this pro forma balance sheet, carried this item formerly at \$7,676,445.46 at \$5,200,000. Will you explain that figure? A. I based that entirely upon the appraisal of Brown, Wheelock, Harris & Stevens, Inc.

Q. Was there included in the \$5,200,000 the \$4,000,000 mortgage which is pledged to secure your \$3,000,000 note? A. Yes.

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Q. The \$1,200,000 represents your determination of the fair value and the realizable value of the \$3,675,000 note and the stock investment which you told us about? A. Yes.

Q. So that no one will be misled about it, in this \$5,200,000 item, which appears on Debtor's Exhibit 4 for identification, you have on the assets side made no deduction of the \$3,000,000 note which will appear on the liabilities side, that is, the note under which the mortgage is pledged, is that correct? A. Yes, sir.

Q. Take the next item of Plaza Operating Company, non-interest bearing demand note in principal amount of \$3,930,000, carried on page 12 of this balance sheet at one dollar, and I will also ask you to go back and consider, under the current assets item, note receivable, Plaza Operating Company, \$175,000, about which the Court asked you a question, and at my request deferred your answering of it until now.

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*Adjourned Meeting of Creditors before Judge Leibell—July
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Arthur J. Flohr—for Debtor—Direct.

Will you explain how you carried those two items on this pro forma balance sheet, Debtor's Exhibit 4 for identification?

A. The note of the Plaza Operating Company, in the principal amount of \$137,500, which is the \$175,000 note as of December 31 reduced by a payment on account since then, is carried at that amount on the pro forma estimated balance sheet.

Q. In your opinion does that represent the full value of that asset as of this date, \$137,500? A. Yes, sir.

Q. Is the fact that the new note is not due until August 30, 1940, the reason why you do not longer carry that as a current asset? A. Yes, sir.

Q. But you carry it at the same figure as it was carried before; less the \$37,500 which has actually been paid on the note? A. Yes, sir.

Q. Why is it you carry it, both on December 31 and now, this note of Plaza Operating Company, being \$3,930,000 and the 25,000 shares of preferred stock and the 34,483 shares of common stock at only a nominal value of one dollar? A. Plaza Operating Company is not earning sufficient to meet the requirements of its first mortgage and until it does meet those requirements, it is my opinion that this note and the stock of the Plaza Operating Company owned by the debtor has no readily realizable value. It may have some potential value but it certainly could not be disposed of at the present time for any amount near its face value or any amount that would not cause a great sacrifice on the part of the company.

Q. Before we leave that \$137,500 note, is that note pledged to secure any note executed by the debtor? A. Yes, sir, it is pledged to secure a note for a similar amount executed by the debtor to the Manufacturers Trust Company.

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Arthur J. Flohr—for Debtor—Direct.

Q. What rate of interest does that note of the debtor to the Manufacturers Trust Company bear? A. 4 per cent. —

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Q. Under the circumstances, if this note is a 4 per cent note and you are paying 4 per cent to the Manufacturers Trust Company, do you receive any net income from such note? A. No, sir.

Q. Could the debtor dispose of this \$137,500 note so long as its indebtedness to its pledgee, Manufacturers Trust Company, is unpaid? A. No, sir, it could not.

Q. As far as the big note, going back to that, this non-interest bearing note of \$3,930,000, does it pay any current interest? A. No.

Q. When was the last date the company received any interest on this note? A. 1933.

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Q. Do I understand that for more than six years you have received no interest of any kind on this \$3,930,000 note? A. We haven't received any since 1933.

Q. Why haven't you collected any interest on the note? A. The earnings of the Plaza Operating Company were not sufficient to pay any interest on the note.

Q. With respect to the stock, if the note of \$3,930,000 has paid no interest for six years because of lack of earnings, is there any value to this stock? A. I would say there is none.

Q. Does that company own any real estate? A. It owns the Plaza Hotel.

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Q. And the Plaza Hotel is located at Fifth Avenue and 39th Street? A. Yes, sir.

Q. Is there a first mortgage upon that property? A. Yes, sir.

Q. How large is that first mortgage? A. \$6,800,000.

Q. What rate of interest does that first mortgage bear? A. 4 per cent.

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Q. Is there any provision in that mortgage for amortization out of earnings? A. Yes, sir, there is.

Q. So that I am correct in understanding that the first earnings of that property, if there should be any, over and above the interest on the \$6,800,000 and the taxes, would have to be used in amortizing the principal of that mortgage before anything could be received on your \$3,930,000 note?

A. Yes, sir, that is true.

Q. How much under the provision of this Plaza Operating Company, how much would have to be earned in excess of the interest and tax requirements of the mortgage before any amount would be available to the debtor on its \$3,930,000 note? A. \$300,000 a year.

Q. So that in addition to earnings taxes and the interest, \$300,000 amortization has to be earned before there could be any sum available even for interest on this \$3,930,000 note?

Yes, sir.

Q. How many rooms has this hotel, approximately? A. Oh, in excess of a thousand.

Q. What height is it? A. It is an 18-story, fireproof hotel.

Q. What were the earnings of the Plaza Operating Company in excess of interest on the mortgage but before considering depreciation for the year ending December 31, 1937, and for the year ending December 31, 1938? A. For the year ended December 31, 1937, they were \$178,973.72, and for the year ended December 31, 1938, \$115,803.23.

Q. Do I understand that for the year ending December 31, 1937, in round figures, they missed earnings of \$300,000 required for amortization by \$121,000? A. Yes.

Q. And for the year ending December 31, 1938, in round figures, they missed it by \$185,000? A. Yes, sir.

Q. Did I correctly understand you, that these are figures

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before depreciation and that if you add the proper amount of depreciation upon a building of this character, such as a big hotel building, these deficits would be even larger? A. Yes, sir. 695

Q. Have you the figures as to what was earned towards this \$300,000 amortization for the five months ending May 31, 1939? A. Yes, sir.

Q. How much were they? A. \$50,858.62.

Q. Take it on a monthly basis. What was the amount that should have been earned to ward this \$300,000 amortization payment required under the first mortgage for five months? A. \$125,000.

Q. So that in round figures for the five months the Plaza Operating Company failed to earn its required payment under the mortgage, exclusive of depreciation, by about \$75,000? 50 from 125 would be 75, wouldn't it? A. I would like to say they were not required to make those payments unless they are earned. 696

Q. I appreciate that. A. At this time.

Q. But I mean, you failed to earn what you would have been required to pay if the interest had been earned by \$75,000? A. That is right.

The Court: 5 per cent for the entire year?

The Witness: No, sir; we are required to pay \$300,000 a year after this note of \$137,500 is paid off, one hundred and fifty of it fixed and one hundred and fifty if earned. One hundred and fifty must be paid whether or not it is earned and one hundred and fifty if it is earned. 697

Q. Take the years 1937 and 1938, was the Plaza Operating Company able to obtain a reduction in the rate of interest

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that it was required to pay on this \$6,000,000 plus mortgage?

A. I did not catch the years.

Q. 1937 and 1938. A. I did not quite understand the question.

Q. I mean by that, what rate of interest did Plaza Operating Company, on the \$6,800,000 mortgage, have to pay during the years 1937 and 1938. A. (No answer.)

Q. If you don't know—

The Court: You said something about 4 per cent before.

Mr. Hartfield: It is a 4 per cent mortgage, but my information is that the mortgagee allowed them to pay only 3 per cent because—

The Witness: The mortgage was renewed for five years from May 1, to the best of my recollection, 1936, at 3 per cent for two of those five years and at 4 per cent for the other three of the five years.

Q. So that for all of those years, and in giving these figures of 1937 and 1938, you had the benefit of that concession by the mortgagee of the interest reduction to 3 per cent per annum?

A. Yes, sir.

Q. Up to May 1, 1938? A. Yes, that is right.

Q. If you had had to pay the interest that you had to pay after May 1, 1938, of 4 per cent, the figures would have been even worse than you told us about, is that correct? A. Yes.

Q. What is the aggregate of the figures that you show on Debtor's Exhibit 4 for investments in and advances to subsidiaries, carried on the balance sheet as of December 31, 1938, at \$20,428,489.04? A. \$5,337,875.

Q. Take the next item of the assets side of the balance sheet on page 12, investment in George A. Fuller Company, and which is carried at the total of \$786,493, and which you carry on the pro forma balance sheet, Debtor's Exhibit 4 for

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identification at this date at \$477,300. Will you tell us what that asset represents and why you have reduced on the pro forma balance sheet the value of this asset? A. It represents 7,786 shares of 4 per cent cumulative convertible preferred stock, par value \$100 per share, and 7,893 shares of common stock, par value \$1 per share of George A. Fuller Company, approximately 23 per cent of the voting power of that company, and the values placed on the pro forma balance sheet are based on the quoted market value on the New York Curb Exchange of such stock on June 1.

Q. Do I understand from what you have just told me that on your balance sheet you carried those shares at the par value of \$786,493? A. Yes.

Q. But that on the pro forma balance sheet you have carried them at the quoted market value for the shares on the New York Curb Exchange as of June 1, 1939? A. Yes, sir.

The Court: That is how much?

The Witness: \$477,300.

Q. Is that stock regularly traded in on the New York Curb Exchange? A. It is rather inactive.

Q. But is quoted from time to time, is it? A. There is always a bid and ask price quoted.

Q. Tell us about the shares of the preferred and the shares of the common stock that are pledged. A. Of this stock, 7,334 shares of the preferred stock and 3,667 shares of the common stock are pledged with the Manufacturers Trust Company to secure the note of the debtor to the Manufacturers Trust Company for \$137,500.

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The Court: Is that that same note you mentioned before?

The Witness: Yes, sir.

Q. Is it also deposited to secure a note of the Plaza Operating company? A. It was deposited to secure a guaranty on a note of \$50,000 of the Plaza Operating Company to the same bank, guaranteed by the debtor, but this note has since been paid off.

Q. Was the note originally \$50,000 or \$100,000? A. It was \$100,000 originally.

Q. Since April 1, 1938, has George A. Fuller Company paid dividends on the preferred stock? A. Yes, sir, it has.

Q. Has it paid any dividends on the common stock? A. No, sir.

Q. What have you been receiving as income from the shares of the preferred stock of the George A. Fuller Company? A. At the rate of \$31,144 per year. That is \$4 per share.

Q. How much unpledged stock of the George A. Fuller Company did you hold on January 1, 1939? A. 452 shares of preferred stock and 4,226 shares of common.

Q. What was the quoted market value of this unpledged stock on June 1, 1939? A. \$110,600.

Q. Do you believe that the narrow market which you have told us about, that exists for this stock on the Curb, that you could sell any such block as you hold, if you had to sell it at forced sale at anything like these prices? A. No, sir. I do not.

Q. As I understand it, you have carried the preferred stock at the full quoted value as of June 1, 1939, on this pro forma

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balance sheet, Debtor's Exhibit 4 for identification? A. Yes, sir. I have.

Q. In this figure of \$477,300, you have not made any deduction of any indebtedness for which that stock is pledged?

A. No, sir.

Q. Take the next item, mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds, which appears on page 12. However, before I leave that item of this \$137,500 note, held by the Manufacturers Trust Company, what was the amount of this note originally when the collateral was deposited, if you recall? A. \$550,000.

Q. So the note has been reduced from \$550,000 to \$137,500 since the collateral was pledged? A. Yes, sir.

Q. Going back to this item of \$682,317.10, which you carry on this pro forma balance sheet at \$555,654, will you explain, please, the reason for that change in valuation? A. Well, there are a number of items. Do you want me to take each one up by itself?

Q. Yes, will you, and very briefly go over it. A. There is a one-half interest in a second mortgage of \$323,875, covering two 5-story tenements at 1602-04 York Avenue, New York, which is carried on the books of the debtor at \$1.00. This mortgage originally covered several additional parcels of real estate adjoining 1602-04 York Avenue, New York—

The Court: What street is that? Does anyone know?

Mr. Marx: East 85th Street.

The Witness: But it is in New York.

The Court: But what street?

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Mr. Hartfield: East 85th Street and York Avenue.

The Witness: Yes, 85th.

The Court: Second mortgage or first mortgage?

The Witness: No, sir, it is a second mortgage.

A. (Continuing) This mortgage originally covered several additional parcels of real estate adjoining 1602-04 York Avenue, New York, which were dropped by the owner to the holders of the first mortgages.

Q. When you say "were dropped by the owner to the holders," you mean they permitted the first mortgage holder either to foreclose or receive a deed to the property so that title was surrendered to the holders of the first mortgage?

A. One way or the other, yes, sir. The existing first mortgages on 1602-1604 York Avenue aggregate \$25,000. The second mortgage is past due and no interest has been paid since April, 1931.

The Court: Is that a corner?

The Witness: No, sir, it is not.

A. (Continuing) And the value of our interest in this mortgage is extremely doubtful. I do not believe that it could be sold at this time except at a great sacrifice.

A first mortgage on Breslin Hotel at Broadway and 29th Street, and 14 West 29th Street, New York, which adjoins the Breslin Hotel, in the principal amount unpaid at June 1 of \$520,416.74. The Breslin Hotel is a 12-story hotel containing approximately 400 rooms. 14 West 29th Street is a five-story brick building. The mortgage bears interest at the rate of 3 per cent per annum to May 31, 1942, and 4 per cent per annum from that date to June 1, 1957, when it becomes due. Amorti-

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zation payments thereon are as follows: \$416.66 per month to June 1, 1939, and \$2,500 per month from July, 1939, to June 1, 1940, and \$416.66 per month from July 1, 1940 until maturity.

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The mortgage is carried on the books of the debtor at its face value. At the present rate of interest it yields income to the debtor of approximately \$15,000 per annum. It is held free and clear by the debtor and is not pledged. It is my opinion that this mortgage has a value of \$400,000 but efforts on the part of the debtor to dispose of it at that price have proven unsuccessful.

Q. Do I understand that in this Debtor's Exhibit 4 for identification you have carried that item at \$400,000? A. \$400,000.

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Q. Go ahead. A. A first mortgage on a six-story tenement house at 337-339 East 49th Street, New York, in the principal amount of \$34,000. This mortgage bears interest at the rate of 3½ per cent per annum until March 1, 1940, and 4 per cent per annum from March 1, 1940, to March 1, 1943, when it becomes due. Amortization payments of \$85 are due quarterly until maturity commencing June 1, 1939. The mortgage is carried on the books of the debtor at its face value. It is held free and clear and is not pledged. It yields an income of approximately \$1,200 per year. I believe that the mortgage is worth its face value but do not believe that it could be sold for that amount at this time.

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Q. Have you now explained the reason for the change in the figures of \$682,317.10 to \$555,654.95? A. Did I cover them all?

Q. Don't you have to cover investments in other real estate companies, page 13 of your memorandum?

The Court: What is this unimproved real estate?

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Mr. Hartfield: No, investments in other stocks and bonds.

A. I see. I have it. 150 shares of capital stock of Copley-Plaza Operating Company, being 20 per cent of the outstanding shares of such company. They are carried on the books of the debtor at \$1.00 since they yield no income and are believed to be worthless. The Copley-Plaza Operating Company is the lessee of the Copley-Plaza Hotel in Boston, Mass., and its lease expires on January 1, 1942. Since June 1, 1932, the Copley-Plaza Operating Company has been paying its entire earnings to the landlord as rent and at June 1, 1939, there was in excess of \$1,400,000 of the rent called for under the lease unpaid. The situation as regards this lease is no better now than it has been for the past several years.

5 shares of capital stock of U. S. R. Management Corporation, a 50 per cent ownership thereof, carried on the books of the debtor at par \$500. This stock has a book value of approximately \$750, and probably could be disposed of for this amount. These shares yield no income.

Q. On this pro forma balance sheet at what price do you carry it? A. \$750.

Q. Go ahead. A. 5000 shares of stock of the Van Sweringen Corporation, carried on the books at \$312.50, being the quoted market value as of December 31, 1937. At June 1, 1939, there was no market for these shares that I could find. They yield no income and they are carried on the pro forma balance sheet at no amount.

3509 shares of preferred stock of Alliance Realty Company which are carried on the books at \$24,808.50, the quoted market value as at December 31, 1938. The quoted market as at June 1, 1939, was approximately \$17,545.

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Q. In what amount are they carried on the pro forma balance sheets? A. At \$17,545.

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38,649 shares of common stock of Alliance Realty Company, which are carried on the books at \$2,415.56, the quoted market value as at December 31, 1938.

The quoted market value as at June 1, 1939, was approximately \$1,900. They are carried on the pro forma balance sheet at \$1,932.45.

Q. Is there any active market for either the preferred or common stock of these companies? A. No, sir, they are sold over the counter and there are very few shares traded in.

Q. If you wanted to sell that number of shares, could you get in your opinion the quoted market price for them? A. I do not believe so.

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Q. Do either of these shares yield any income? A. No, sir.

Q. If you could sell them at all, would it be necessary for you to make a sacrifice in your opinion of below this figure of \$1900? A. I believe if we tried to sell all of them we would have to sell them for something a good deal under that.

Q. Go ahead. A. Voting trust certificates representing 8,730 shares of common stock of Stevens Hotel Corporation, the owner of the Stevens Hotel in Chicago, Illinois, which are carried on the books at \$1.00 and believed to be of very doubtful value. These shares yield no income, and the prospect for any income is not good. They are carried on our pro forma balance sheet at \$1.00.

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3 shares of capital stock of Usall Realty Corporation, being a 50 per cent ownership, and advances on notes of \$441,170.85, carried on the books of the debtor at \$1.00. These shares and advances are of very doubtful value, and I do not believe that the amount for which they might be disposed of at this time

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would exceed \$10,000. They are carried on the pro forma balance sheet at \$10,000.

3 shares of capital stock of Onarwa Realty Company, being a 50 per cent ownership, and advances of \$2,325 carried at \$1,750 on the books of the debtor. These shares produce no income but probably could be disposed of at the amount at which they are carried, and are carried on the pro forma balance sheet at \$1,750.

3108 shares of second preferred stock and 2235 shares of common stock of Beaux-Arts Apartments, Inc., which are carried on the books at \$1.00 and are believed to be of little value. These shares yield no income.

Q. Referring to this Beaux-Arts property, do you know whether there are a first and second mortgage on the real property owned by the company? A. No, there is not. There is first preferred stock.

Q. Is this stock which you have second preferred and common? A. Yes, sir.

Q. Do you know whether or not the company is able to earn and to pay the full amount of dividends on the first preferred stock? A. It has not for some time.

Q. Is there any market value at all for this second preferred and common stock which you have in this company? A. No, sir, none that I know of.

Q. Do you know approximately the amount of the first preferred which is ahead of the second preferred and common which you hold? A. Yes, sir, there are 39,375 shares of six per cent cumulative without par value first preferred.

Q. How many shares, did you say, Mr. Flohr? A. 39,375 shares, of which 2,782 shares have been purchased through the sinking fund and retired.

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Q. Is there a stated value on that first preferred stock in the event that it is retired? A. There is a minimum liquidation value of \$100 per share. 625

Q. That would make approximately \$3,960,000 that would be ahead of the second preferred and common stock? A. I would say approximately \$3,700,000.

Q. Has there been any accumulating dividend on that for a period of time? A. Well, dividends are unpaid since February 1, 1931, at \$6 per year.

Q. So in round figures you would add to that \$3,700,000 48 per cent cumulative dividends? A. Approximately 48 per cent, yes, sir.

Q. Take the next item, please. A. 14,156 shares of preferred stock and 57,424 shares of common stock of the National Hotel of Cuba Corporation, which are carried on the books at \$1.00 and are believed to be without value. These shares yield no income. 626

Q. Are there any securities of any kind ahead of this preferred and common stock of the National Hotel of Cuba held by the debtor? A. Yes, sir. June 30, 1938, there were \$5,380,100 of 30-year, 6 per cent income debentures outstanding, on which interest was unpaid from September 1, 1931, the accumulated interest amounting to \$2,205,000 June 30, 1938.

Q. As I understand it, these prior securities are held by the public, by others, not in anywise held by the U. S. Realty & Improvement Company? A. Yes, sir. 627

Q. Is it because of these prior obligations that you testified that in your opinion the securities owned by the United States Realty & Improvement Company in the National Hotel of Cuba have no value? A. Yes, sir.

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Q. You carry them on the pro forma balance sheet as you did on the balance sheet of December 31, at \$1.00, is that right? A. Carry them at no amount. Take out the dollar.

Q. Take the next item. A. 1,512 shares of preferred stock of 110 Fifth Avenue Corporation, par value of \$100 each, which are fully reserved for on the books of the debtor.

Q. What do you mean by "fully reserved for on the books of the debtor"? A. Well, there is a reserve set-up to offset the value of the stock.

Q. In other words, the amount of the reserve you set up on the liabilities side is equal to the amount at which you carried the asset on the assets side? A. Yes.

The Court: Tell us why that is.

Q. Yes.

The Court: You say here is some stock you own, is that right?

Mr. Hartfield: Yes.

A. Well, we have owned it a long time and the directors at one time decided that the stock was worthless and they set up a reserve against it in its full amount.

Q. Why did they decide it was worthless, what about the earnings? Are the earnings sufficient to meet the interest and amortization requirements on the mortgage? A. No, sir, at the present time they are not.

The Court: Why did you need a reserve?

Mr. Hartfield: He has just given you the reason.

The Court: Is there any contingent liability or anything like that?

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The Witness: Well—

The Court: You mean they charged it off?

Mr. Hartfield: That is, in effect, what it means, because the earnings of the corporation were not sufficient to meet the interest and amortization payments on the mortgage. They charge off their investment in the stock by setting up a reserve equal to the investment instead of just writing it off, as is one way of doing it.

The Court: And hold it for another tax year?

Mr. Hartfield: And hold it for another tax year.

Q. Take the next item on your list. A. Voting trust certificates representing 8,576 shares of Class B Common stock of Fuller Building Corporation, carried on the books of the debtor at the nominal value of one dollar, are believed to be of little value but are nevertheless pledged as security for its guarantee of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation, 15-year sinking fund 6 per cent gold debentures, and for the payment of interest, sinking fund and principal at maturity of the 6 per cent sinking fund debentures due January 1, 1944, of the debtor subject to an agreement to surrender such stock to the Fuller Building Corporation in the eventuality of a failure of the Fuller Building Corporation to earn or pay the fixed interest on its first mortgage loans. Such voting trust certificates yield no income. The earnings of the Fuller Building Corporation are not sufficient to meet all of the requirements of the aforesaid first mortgage loans.

Q. At what price were these voting trust certificates, pledged as aforesaid, carried on the balance sheet as of December 31, 1938, and at what price are they carried on the pro forma balance sheet? A. Carried at one dollar on December

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31 31 balance sheet and at no value on the pro forma balance sheet.

Q. In your opinion, based upon your experience, does the carrying of these shares at one dollar and no value representing the actual value as of December 31 and as of June 1, 1939?

A. Yes, sir, in my opinion that is what they are worth.

The Court: Is there an obligation of the debtor as guarantor of certain bonds of this Fuller Building?

The Witness: No, sir.

35 The Court: You said something about these voting trust certificates having been pledged as security for the guarantee of the debtor.

The Witness: Yes, both of the debtor and debentures of the G. A. F. Realty Corporation, which are now really an obligation of the debtor. They are subject to exchange for our 6 per cent debentures but some of them have not been exchanged.

Q. The G. A. F. Realty bonds which are guaranteed by the debtor cover the property at Madison Avenue and 57th Street? A. No, it doesn't cover any property. It is merely debentures.

36 Q. But, I mean, the G. A. F. Realty Company owns the property? A. They don't own it now. They did own it and in reorganization the property was transferred to the Fuller Building Corporation from the G. A. F. Realty Corporation, but the G. A. F. Realty Corporation is an inactive subsidiary now of the U. S. Realty & Improvement Company.

Q. But these voting trust certificates, I understood you to say to the Court a minute ago, were pledged for your guarantee of the interest, sinking fund and principal at maturity of

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the G. A. F. Realty Corporation 15-year sinking fund 6 per cent debentures. A. That is right.

Q. And those debentures are still outstanding? A. Yes, sir.

Q. Take the next item. A. \$54,000, principal amount of bonds of Robert and Minnie H. Kloeppel secured by a second mortgage on the George Washington Hotel, Jacksonville, Florida, which are carried at cost, \$48,600. These bonds produce an income of \$2,160 per annum and they are serial bonds and are being paid when due, and while they could not be disposed of at principal at the present time, they probably could be sold for 75 per cent thereof, approximately \$40,000.

\$179,000 principal amount of income bonds of Savoy-Plaza, Inc. together with voting trust certificates for 2,112 shares of \$1.00 par value Class A common stock carried at the quoted market value as at December 31, 1938, \$49,672.50. The present market value is approximately the same. These bonds could probably be disposed of for this amount, and they are carried on the pro forma balance sheet at the same amount. In addition, the debtor owns voting trust certificates representing 27,350 shares of \$1.00 par value Class B common stock of Savoy-Plaza, Inc., which are carried on the books at \$1.00. Such stock yields no income and the prospects of its yielding any are very remote. There is no quoted market value for it. It has not been pledged.

Q. At what price do you carry those voting trust certificates for 27,350 shares of Class B common stock of Savoy-Plaza, Inc. on this pro forma balance sheet? A. At \$1.00.

Q. That covers, does it, the item which appears on the balance sheet of mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds? A. I believe it does.

The Court: The first meeting will recess until two o'clock.

(Recess until 2.00 p. m.)

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AFTERNOON SESSION.

Mr. Arkush: If your Honor please, before the examination of the witness is continued, I would like to beg your Honor's indulgence for a moment on the question which your Honor raised this morning as to the position of these committees. I happen to be of counsel in another Chapter XI proceeding which has been pending in this court for several months, namely, the Haytian Corporation. I believe it is the largest case, outside of this one, pending under that chapter, and in that case there was a very vigorous fight between the management and three committees, a four-cornered fight, but before any of the committees, or the management got together on any kind of plan, and more or less at the suggestion of the court or a referee, the committees did cooperate in electing a statutory committee and it seems to be that if a statutory committee is to be elected, it should be done as early as possible and accordingly, I move your Honor that the creditors here represented be permitted now to nominate and elect a creditors' committee under Chapter XI.

The Court: I suggested that this morning, that there should be a formal committee, one elected, and the statute provides for it to be elected at the first meeting of creditors, and this is the adjourned first meeting of creditors.

Mr. Arkush: For that purpose, your Honor, on behalf of the Grimm Committee, I would like to nominate Mr. Peter Grimm, who is chairman of that committee, and Mr. Charles F. Simmons, its president, as his alternate, in case Mr. Grimm cannot attend.

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The Court: May I make a suggestion. Here are three committees. I do not suppose the debtor itself wants to vote—they have powers of attorney but they won't want to vote any power of attorney even indirectly in connection with the election of a committee.

643

Mr. Arkush: I do not think they are permitted to under the act.

The Court: Why not merge these three committees?

Mr. Arkush: The reason we cannot do that at this time, as your Honor probably gathered at the last hearing, is that at the present time the committees do not see eye to eye. I do not know to what extent the Beha Committee and the Earl Committee are in unison, but we have not, in our literature or in our conversations with the bondholders disapproved this plan. The plan is acceptable to us subject to some reservations which we think rather minor reservations and ones which ought to be acceptable to the company. We have communicated those to the company and they have not given us a reply, but subject to that reservation—

644

The Court: How about powers of attorney?

Mr. Arkush: We are all equipped with powers of attorney.

The Court: Is your committee properly equipped with powers of attorney to vote the claims?

645

Mr. Rickaby: We have powers of attorney to represent them. We do not care particularly about voting the claims. As a matter of fact, our powers of attorney here are not acknowledged. We have not asked to have them acknowledged and there may be some question about that.

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7, 1939.*

Mr. Arkush: We do not raise that question.

Mr. Rickaby: I do not think anybody has raised that question.

The Court: Perhaps the Court would not shut its eyes to that, that is the point.

Mr. Rickaby: In view of the position we have taken, we have not asked to be counted as consenting to or rather we have been opposing this question on the question of law, based on the evidence, that it is unfair.

The Court: What about the other committee?

Mr. Rickaby: I was going to say to your Honor, Mr. Arkush just spoke to you about that suggestion, and said it was done in another matter, and, well, something like that might be worked out if we had an opportunity to do it, I mean if there was an adjournment of this meeting.

The Court: Oh, I would not just have a snap election now.

Mr. Rickaby: I should like to speak to the chairman of our committee, who is not here, and talk it over with him. I do not want to speak for him without at least having an opportunity to consult with him. I want to be cooperative in the expedition of this proceeding but I certainly do not want to do anything which is going to help the confirmation of this plan, because I do not think the plan can be sustained.

The Court: What about the other committee?

Mr. Bardusch: Briefly, your Honor expressed my feelings. I should not feel it should be done now without first giving the matter serious consideration and consulting with my clients to determine whether or not

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we should join in a general committee, but I would like that right reserved.

The Court: Have you a power of attorney which will enable you to vote the claims of your client?

649

Mr. Bardusch: Our power of attorney is perhaps rather restricted. It permits us to appear by counsel in court proceedings, to be heard on all the matters in this proceeding with the same force and effect as if the creditor were here in person. There is no express statement that we may vote the claims.

Mr. Marx: I think I may be able to clear this question up. I have had it specifically in mind since this proceeding was instituted and it is my understanding that Section 338 of the Act requires that a majority of the creditors presently filing proofs of claim which are allowed, is necessary to elect a committee. In view of the fact that we have such a majority and in view of the fact that whether by reason of the statute or otherwise, we are not going to vote them, it does not seem that any committee can be elected.

650

The Court: Oh, well, I do not think that is the purpose of the act.

Mr. Arkush: May I point out that this section is subject to the provisions of the earlier chapters. As you know, the provisions of the early chapters are applicable to a certain extent to Chapter XI.

651

The Court: Yes, insofar as not inconsistent with Chapter XI.

Mr. Arkush: Under Section 56-A of Chapter VI, it is provided that creditors shall pass upon claims submitted to you at the meeting by majority vote

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7, 1939.*

in number, and amount of claims of all creditors whose claims are allowed, and who are present, or as otherwise provided. It seems to me creditors who have claims but who have issued no authorizations and are not present at this meeting do not comply with this section.

Mr. Hartfield: We do not want to concede that interpretation by saying nothing about it. There are certainly present those creditors who have—

The Court: Whose proofs of claim have been allowed.

Mr. Hartfield: Certainly.

The Court: And they have been filed. So they are in the proceeding.

Mr. Rickaby: I was prepared at the proper time to argue the question your Honor suggested this morning. I do not think it makes any difference to the committee so-called, that I represent, whether you call them a committee or a group or agents or what. They have powers of attorney to appear in the proceeding and to represent, and that is borne out by the rules of the United States District Court for this district. I have in mind particularly—I do not know whether your Honor has a copy of the rules in front of you, I will hand this up—rule XI-9, which requires certain committees to do certain things, corresponding to the requirements in the statute relative to Chapter XI, where they have to file statements as to how they came into existence and one thing or another, but that applies only to a committee that accepts the plan. On the other hand, in rule VIII, as to the solicitation of proxies, the language there refers to the appointment

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of any trustee in bankruptcy or of the official creditors' committee, I mean, distinguishing that from a committee which is simply representative of a certain number of creditors.

655

The Court: Hand that up, please.

Mr. Rickaby: What your Honor referred to this morning, at least what I thought your Honor referred to, was the section of the act there indicated. There must be a clear distinction there between that and the so-called official committee.

The Court: Under that, the acceptances received by the debtor, Rule 8(a), they are all right, but there is no power of attorney that goes with them, no proxy, and that would have been barred under rule 8(a), subdivision (a) of the bankruptcy rules of this district court, Southern District of New York. Rule XI-9—it is XI(c)9, that has to do with a composition under Section 12, if you read the heading.

656

Mr. Marx: There is XI-9.

Mr. Rickaby: XI, 9. Page 98 of the book I have. That is the one I have in mind. That only applies to a committee who is attempting to accept. My committee does not come under that classification. I merely refer to that rule because it evidently, on its face, contemplates something different from a statutory committee. That is its sole relevancy, because I think it contemplates something different from the statutory committee, and I thought what your Honor probably had reference to this morning was the provisions of Section 338.

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The Court: Section 338, for the election of a committee.

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7, 1939.*

658 Mr. Rickaby: It refers to the fact that at the first meeting the creditors may appoint a committee, if none has been previously appointed under the Act, but that does not seem to be exclusive.

The Court: It seems to me that a court in a proceeding of this kind might permit the formal intervention of a committee, but we must have in mind the fact that that committee and its attorney could not receive any compensation under the decisions.

Mr. Rickaby: That might well be.

659 The Court: I have before me now an opinion of Judge Patterson, when he was sitting in the District Court, in the matter of Max Fishman, Incorporated, and the bankruptcy number of that case is 72,298, in which he so interpreted Chapter XI and subdivisions relating to committees and allowances thereunder, and in particular he referred to Section 338 and Section 337, subdivision 2, as to expenses of committees. It may be that a committee would be permitted to intervene so as to represent one particular view in respect to the amended plan, and yet it would not be the formal committee of creditors elected by the creditors at a first meeting provided for in Section 338.

Mr. Rickaby: I might say to your Honor—

660 The Court: That committee might be compensated, but the other committees, if they are permitted to intervene, may not be compensated unless there is a provision in the plan for their compensation, and Judge Coxe had a case where the situation arose, matter of Fisher Dress Corporation, and that is number 72,545 in bankruptcy in this court.

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Well, the matter of a formal election of a creditors' committee was covered by the notice, wasn't it?

Mr. Marx: No, sir.

661

The Court: Didn't your notice provide that at the said first meeting of the creditors' committee that a committee might be elected?

Mr. Marx: No, I don't think—

Mr. Hartfield: We understand that Section 338 is not a mandatory section. There is no statement that a committee must be appointed.

The Court: No, it may be.

Mr. Hartfield: And your Honor, the notice, it is my recollection of it, contained no reference to the appointment of a committee, but, as a practical matter, your Honor, it is clear that you are not called upon to exercise your discretion of whether or not there should be a statutory committee here because there isn't any majority in number that could possibly vote for the committee suggested by Mr. Arkush when the two other committees present say they are not prepared to vote, and those two have a clear majority of the vote. Even if you exclude those large number of noteholders who have agreed to accept the plan, and who have given consents, I do not see, as a practical matter, there is anything that you can pass upon.

662

Mr. Arkush: I made this suggestion, that we elect one alone. Until Mr. Rickaby and Mr. Bardusch are ready to vote, why naturally we will have to wait, because, as the Colonel says, they do control a majority in number and amount of those represented here.

663

The Court: Let us proceed.

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7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

ARTHUR J. FLOHR, resumed the stand.

Direct Examination by Mr. Hartfield (Continued):

Q. Mr. Flohr, we had reached, in the consideration of the assets appearing on the balance sheet dated as of December 31, 1938, attached to the amended modification plan and arrangement, the item under the heading, unimproved real estate, \$953,213.55, less reserve for depreciation, \$2,340.03, making a net total of \$950,873.52, and it appears on your pro forma balance sheet, that is Exhibit 4, as \$290,000. Will you explain what that item consists of? A. Numbers 15-15½ Thames Street, New York City, owned free and clear and carried on the books of the debtor at \$62,524.57, its cost, less depreciation. This is a four-story brick building on a plot 38x37, and is rented to one tenant, a restaurant, at \$1320 per year. The net income for the year 1938 was \$372.64. It is assessed by the City of New York for tax purposes at \$30,000. On an income basis, this property has very little value, and the market value is probably not in excess of \$20,000. We have had no recent offers for the property.

Q. At what price do you carry this four-story brick building, 15-15½ Thames Street, on your pro forma balance sheet?

A. At \$20,000.

Q. Where does Thames Street run? A. Runs from Broadway to Greenwich Street, I believe, between 111 and 115 Broadway down to Trinity Place and directly west of that to Greenwich Street.

Q. So this property is in the block between Greenwich and

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West Broadway, isn't it? A. No, between Trinity Place and Greenwich Street.

667

Q. What is the next item on that? A. Numbers 341-359 East 49th Street, and numbers 883-891 First Avenue, New York City, carried on the books of the debtor at \$613,362.26. This property is vacant except for a six-story tenement house at 346-347 East 49th Street, New York. The debtor has entered into a contract dated June 18, 1939, for the sale of this property for \$170,000, payable \$10,000 on the signing of the contract, \$40,000 on delivery of the deed on September 1, 1939, and the balance, \$120,000, by the delivery of a purchase money mortgage at five per cent interest due on or before one year from the date of the delivery of the deed.

668

Q. Does this contract you have entered into, cover all the property or just this six-story tenement house? A. No, it covers the entire business.

Q. That is, the tenement house and the vacant property? A. Yes, sir.

Q. In making that sale, what efforts did you resort to in order to get the highest possible price? A. We have been trying to sell the property for several years, and this is the best offer we have had.

Q. Did the executive committee authorize entering into the contract? A. Yes, sir, it did.

Q. Did you participate in those discussions and conclusion to sell the property? A. Yes, sir.

669

Q. Do you say to the Court that you believe, as all your directors, that the sale was for the best interests of the company and was the highest possible price obtainable for the property? A. Yes, sir.

Q. In the pro forma balance sheet, at what price do you

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carry this item of \$613,362.26? A. Carry it at \$170,000.

Q. And that is the full purchase price to be received under the contract of sale? A. Yes.

Q. Take the next item. A. Real estate in the city of White Plains, New York, designated as lots 21 and 22, and 46 and 47, on the map of the Carhart Homestead, White Plains, Westchester County, filed with the Register of the County of Westchester, on June 16, 1902, in volume 14 of maps, page 73, owned free and clear, and carried on the books of the debtor at \$125,468.18. This property, located on the corners of Mamaroneck, Livingston and Waller avenues, in White Plains, New York, dimensions approximately 100 x 260, is rented to a tenant who has erected thereon a moving picture theatre, and the ground rental under the terms of the lease is \$2,750 net per annum to September 30, 1940, and \$3000 net per annum from October 1, 1940, to September 30, 1942. The property is assessed by the city of White Plains, for tax purposes, at \$54,000, and has been offered for sale to the lessee for \$50,000, and its current market value is probably no greater than this amount.

Q. At what price have you carried this property that was formerly carried on the balance sheet at \$125,468.18? A. On the pro forma balance sheet it is carried at \$50,000.

Q. And that is on a six per cent basis when the rent is increased on October 1, 1940, to \$3000? A. Yes, sir.

Q. Take the next item included in that. A. Real estate in the city of White Plains, New York, designated as Lots 15, 16 and 17, on the same map, owned free and clear, and carried on the books of the debtor at \$149,383.11. This property is vacant land on Mamaroneck Avenue, between Livingston and Carhart avenues, White Plains, New York, with a frontage of 150 feet and a depth of 135 feet. It is

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assessed by the city of White Plains, for tax purposes, at \$65,000, and its present market value is probably not in excess of \$50,000. It is not leased and produces no income.

673

Q. At what price have you carried this piece of property, formerly carried at \$149,383.11 on this pro forma balance sheet, Debtor's Exhibit 4? A. At \$50,000.

Q. The next item, office furniture and fixtures, the same on both balance sheets, \$1458.18, is it not? A. Yes.

Q. The next item, prepaid expenses, \$13,200.48, is carried on the pro forma balance sheet as \$20,087.53. What is your explanation of that? A. That is taxes paid in advance and unearned insurance premiums and, as a going concern, is worth that much to the company.

674

Q. Before we leave the assets aside of this pro forma balance sheet, can you summarize what is the value of the December 31, 1938 balance sheet of the unpledged property? A. Unpledged property is carried on the books of the debtor at \$18,524,761.79.

Q. What is the estimated realizable value you have on that property? A. Approximately two and a half million dollars.

Q. What has that property lately been yielding the debtor, what income? A. Approximately \$96,000 per annum.

Q. What is your estimate of what it will produce, reasonably, in the next few years? A. Probably \$60,000 per annum.

Q. Take the property which is pledged to secure that; what was the book value of that as of December 31, 1938? A. Book value of June 1, 1939, \$4,874,628.14.

675

Q. What is the estimated realizable value? A. Approximately \$4,500,000.

Q. Of course, included in that is this \$4,000,000 Whitehall mortgage, is it not? A. Yes, sir.

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Arthur J. Flohr—for Debtor—Direct.

76 Q. And the income from that amounts to how much? A. Approximately \$270,000 per annum.

Q. Let us go to the liabilities side, and let us spend just a few minutes on that. Mr. Flohr, as I read this Debtor's Exhibit 4 for identification, you show, and have testified here today, that in your opinion the fair value of the assets of the United States Realty and Improvement Company as of June 1, 1939, was \$7,076,515.92, is that right? A. Yes, sir.

77 Q. Do you now state to the Court that that is, based upon your years of experience with this company and with your knowledge of its investments and its assets and with the amounts due to it, is the fair and reasonable value of those assets and choses in action? A. I do.

Q. Take the liabilities side. I do not think the first item needs any explanation, accounts payable and accrued taxes and interest. They are just current liabilities incurred in the usual course of business and they are either due immediately or presently will become due, isn't that right? A. Yes, sir.

Mr. Arkush: May we have that as of June 1?

Mr. Hartfield: \$74,916.59.

78 Q. Take the first item, debentures and notes payable, \$1,203,500. What are they? A. Those are fifteen-year sinking fund six per cent Gold debentures of G. A. F. Realty Corporation, dated January 1, 1929, and due January 1, 1944, guaranteed by the United States Realty and Improvement Company as to principal, interest and sinking fund payments.

Q. What was the total amount of those outstanding originally? What is the amount now outstanding, as distinguished from those held in the treasury? That is a better way to put it? A. There are outstanding now \$2,162,500 principal amount of these debentures.

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Arthur J. Flohr—for Debtor—Direct.

Q. How many gold debentures are held in the treasury?

A. \$959,000 principal amount.

679

Q. That leaves outstanding in the public \$1,203,500? A. Yes.

Q. What is the next item appearing on the liabilities side?

A. Six per cent sinking fund debentures due January 1, 1944, of United States Realty & Improvement Company, of which there are outstanding \$1,187,000 principal amount, and of which \$51,500 principal amount are held in the treasury of the debtor.

Q. As I understand it, they are the unconditional obligations of the United States Realty & Improvement Company which mature January 1, 1944, and are outstanding in addition to those held in the treasury in the sum of \$1,135,500? A. Yes.

680

Q. Has the company regularly paid the interest due upon those outstanding debentures? A. Yes.

Q. Are they secured in any manner? A. They are secured by the pledge of this—

Mr. Rickaby: I do not want to object, your Honor, but I think the documents relative to those debentures, that is, the trust indenture, and the pledge agreement, should be put in evidence.

The Court: You may inquire as to that on cross examination.

681

A. (Continuing) They are secured by the deposit of voting trust certificates representing 8576 shares of Class B Common stock of the Fuller Building Corporation.

Q. The next item is what on the liabilities side? A. Note payable, at 4 per cent per annum, due August 12, 1939, to the National City Bank for \$3,000,000.

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Arthur J. Flohr—for Debtor—Direct.

Q. And that is the note that you told us about this morning, secured by the \$4,000,000 Whitehall mortgage? A. Yes.

Q. And interest has been regularly paid to the National City Bank on that note? A. Yes.

Q. What is the next item of \$137,500? A. It is a note payable to the Manufacturers Trust Company, due \$37,500 on November 30, 1939, and \$37,500 quarterly thereafter until August 30, 1940, when the balance becomes due.

Q. Is that the \$137,500 you told us about this morning, remaining of the original \$550,000 of indebtedness? A. Well, this is—yes, sir.

Q. What is the total amount of these obligations of the U. S. Realty & Improvement Company outstanding? A. \$5,476,500.

Q. Do these liabilities which you told us about include, or are they exclusive of the contingent liabilities of this U. S. Realty & Improvement Company? A. They are exclusive of contingent liabilities.

Q. Have you annexed to this pro forma balance sheet, Debtor's Exhibit 4 for identification, a list of the contingent liabilities of the company? A. Yes, sir.

Q. Will you briefly state what those contingent liabilities of the company are? A. One is the guarantee of principal, interest and sinking fund payments on the first mortgage 20-year 5½ per cent sinking fund gold loan certificates, dated June 1, 1919, of Trinity Buildings Corporation of New York. \$3,710,500 principal amount of these certificates and interest of \$102,038.75 were unpaid at June 1, 1939.

Endorsement of the note payable for \$50,000, due \$25,000 July 30, 1939, and \$25,000 on August 30, 1939, of Plaza Operating Company, which note has since been paid.

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Proposed deficiency in Federal income taxes for 1933 which is being contested—approximately \$45,000. The company's Federal income tax returns for the years 1935 to 1938 inclusive are subject to review by the United States Treasury Department.

685

A proposed assessment of intangible personal property taxes by the city of Jersey City, New Jersey, for the years 1937 and 1938 in an indeterminate amount.

Q. With the exception of ordinary litigation, the ordinary causes for personal injury, does that contain a statement of the contingent claims as you know them. A. Contingent liabilities, yes.

Q. Contingent liabilities, I should say. Having excluded altogether contingent liabilities, and considering the \$18,000,000 of capital stock shown on your balance sheet, how much of a deficit exists? A. On the basis of the estimates that I have placed in making up this pro forma balance sheet, a deficit of \$16,474,900.67 exists exclusive of any contingent liabilities.

680

Mr. Hartfield: We now offer in evidence, if your Honor please, Debtor's Exhibit 4 for identification, being the pro forma balance sheet prepared by this witness under the circumstances testified by him.

Mr. Rickaby: No objection.

687

The Court: Received.

(Debtor's Exhibit 4 for identification received in evidence.)

Q. On the indebtedness which the company owes, exclusive, you know, of this mortgage guarantee of the Trinity

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7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Buildings Corporation, how much interest is the company required to pay a year? A. Approximately \$267,500.

Q. Have you made any estimate of what the sinking fund requirements of the company will have to be on this indebtedness within the next three years? A. I estimate that sinking fund requirements on this indebtedness will necessitate the expenditure of approximately \$75,000 within the next three years.

Q. Mr. Flohr, will you tell the Court whether or not the debtor is at this time able to meet its guarantee of the share certificates on the First Mortgage alone of the Trinity Buildings Corporation, and give the reasons for your answer. A. The debtor is unable to meet its guarantee of the share-certificates at the present time, since it hasn't sufficient cash and since it is not in a position to liquidate and realize upon its investments without serious loss to other creditors and, incidentally, to its stockholders.

Q. If that is so, why does the debtor make this arrangement offer? A. I do not quite understand that.

Q. I mean, what is the debtor's hope in connection with this situation in making this arrangement offer to give a new guarantee on the outstanding obligations of the Trinity Buildings Corporation? A. Well, we believe that within the next three years we will have sufficient cash and sufficient earnings to meet the new guarantee of interest on the First Mortgage loan, and I also believe that within ten years we will be able to, or will be able to cause the Trinity Buildings Corporation to pay off the loan in its entirety or to refund the same.

Q. When you say refund, you mean that you will reduce the mortgage to such amount that you can be able to obtain

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Arthur J. Flohr—for Debtor—Direct.

a new loan to take it up from some other source? A. Either to reduce it or to get it for its full amount, if business gets a little better.

Q. You gave us the other day figures with respect to the income from these two buildings, but, as I remember it, when you testified on June 28th you said there had been paid in excess of \$11,000,000 to the U. S. Realty & Improvement Company as interest on its notes for \$8,871,000. Did I understand your testimony to mean that you had actually paid this amount in cash? A. I didn't mean that. I meant that in excess of eleven million dollars, to be exact \$11,228,949.35, had been accrued to December 1, 1932 as interest on the note of the United States Realty & Improvement Company, and had been credited to its open account and charged to interest expense on the books of the Trinity Buildings Corporation of New York.

Q. What I want to know is, was all this money actually paid in cash to the United States Realty & Improvement Company prior to December 1, 1932? A. No, there was still due the United States Realty & Improvement Company on December 1, 1932, \$1,738,962.44 on open account, so that the net amount actually paid to United States Realty & Improvement Company prior to December 1, 1932, was \$9,489,986.91.

Q. Has anything been paid to the United States Realty & Improvement Company since December 1, 1932? A. Yes, up to December 1, 1934, there were debits and credits to the open account of the United States Realty & Improvement Company which resulted in a net debit to the account or payment to the United States Realty & Improvement Company of \$184,127.95, thereby reducing the balance on open account

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Arthur J. Flohr—for Debtor—Direct.

at December 1, 1934, to \$1,554,834.44. From December 1, 1934, to December 31, 1938, there were net credits to the open account or payments by the United States Realty & Improvement Company to Trinity Buildings Corporation of New York of \$106,456.06, making the balance on open account at December 31, 1938, \$1,661,290.55, and making the amount of interest actually paid to the United States Realty & Improvement Company over the term of the mortgage, \$9,567,658.80.

Q. For how many years has interest been paid on the First Mortgage of the Trinity Buildings Corporation of New York?

A. For nineteen and a half years, to December 1, 1938.

Q. At what rate of interest? A. $5\frac{1}{2}$ per cent.

Q. What was the net amount of interest actually paid to the United States Realty & Improvement Company by the Trinity Buildings Corporation of New York on its notes? What was the average rate of interest over the same nineteen and a half years? A. An average of slightly in excess of $5\frac{1}{2}$ per cent, to be exact 5.59 per cent.

Q. Did the United States Realty & Improvement Company have any investment in the Trinity Buildings Corporation in addition to the note that you have told us about of some nine million dollars plus? A. Yes, sir, it had an interest of a million dollars in the capital stock of the Trinity Buildings Corporation.

Q. When you say it had an investment, do you mean a cash investment of a million dollars? A. It was property, I would say, at the time of the conveyance, conveyance of a property from Trinity Buildings to the United States Realty, or, rather, from the United States Realty to Trinity in 1919.

Q. And that represented the fair value of what was paid in for the capital stock of the company? A. Yes, sir.

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7, 1939.

Arthur J. Flohr—for Debtor—Direct.

Q. If you add this million-dollar investment in the capital stock, what was the total investment of United States Realty & Improvement Company in Trinity Buildings Corporation?
 A. \$9,781,192.44.

697

Q. During this 19½ year period what was the average return that the United States Realty & Improvement Company had upon its investment of \$9,781,000 plus? A. An average of slightly in excess of five per cent per annum, to be exact 5.02 per cent.

Q. Have you prepared, Mr. Flohr, a statement showing the cash balance of the debtor as of the close of business May 31, 1939, and your estimated cash receipts and disbursements for the period June 1, 1938, to December 31, 1941?
 A. June 1, 1939, to December 31, 1941?

698

Q. Yes. Is the paper which I now show you this statement so prepared by you or under your supervision? A. Yes, sir.

Q. And is that in your opinion a correct statement both of the cash on hand and your estimate of the cash receipts and disbursements for the period June 1, 1939, to December 31, 1941? A. That is, to the best of my ability.

Q. Correct? A. Correct, yes.

699

Mr. Hartfield: I offer this in evidence. I will give copies of it to the gentlemen to whom I gave copies the last time.

(Marked Debtor's Exhibit '6 in evidence.)

Mr. Rickaby: That is simply his own judgment?
 Mr. Hartfield: Yes.

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Arthur J. Flohr—for Debtor—Direct.

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The Witness: I would like to qualify that, Colonel, if I might, by saying that it does not provide for any of the expenses of this proceeding.

Q. And to the extent that any of the expenses of the proceeding have to be paid by U. S. Realty & Improvement Company, your estimate of the cash position will be reduced?

A. Yes, sir.

701

Q. I asked you a minute ago, and you told us that no dividends of any kind were paid by the Trinity Buildings Corporation to the U. S. Realty & Improvement Company during the period in question. Were any other sums received other than these payments of interest, which were shown on the books of your company, did you receive indirectly any sums in lieu of dividends or otherwise? A. No, sir.

Q. Did the Realty Company pay rent to the Trinity Buildings Corporation during this period for the space it occupied there? A. Yes.

Q. And I want to know, did it get the rent at less than the market price, or did it pay the full market rate for the space occupied? A. Always at the market price.

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Q. Have you any idea of what the aggregate of rent paid by the U. S. Realty to the Trinity Buildings Corporation was during that period? A. It was approximately \$338,000.

Q. Mr. Flohr, when it came to the time to prepare this plan and modification of the plan, could you tell us how the original plan was first prepared? A. On December 4, 1936, after the income of Trinity Buildings Corporation of New York from the mortgaged premises had fallen below its interest requirements, counsel was consulted and both Trinity

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Buildings Corporation of New York and the debtor were advised that under the mortgage moratorium statutes of the State of New York they were not required to make sinking fund payments so long as interest and taxes were met. Thereafter, on the advice of counsel, sinking fund payments were discontinued, and payments aggregating \$647,144.32 have been postponed under the terms of the mortgage and under the provisions of the New York State mortgage moratorium law.

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In June of 1938 the debtor and Trinity Buildings Corporation of New York again consulted counsel with respect to the impending maturity of Trinity Buildings Corporation of New York First Mortgage Loan and the guarantee thereof by the debtor. Numerous conferences and plans and methods for reorganizing or refunding the mortgage loans were considered. Attempts had previously been made without success to secure a new first mortgage loan sufficient to enable Trinity Buildings Corporation of New York and the debtor to pay off the present loan. Thereafter, counsel conferred with the Reconstruction Finance Corporation concerning the possibility of its making such a loan, but without avail.

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Some time in September 1938 counsel proposed a method of extension and modification under Chapter XI of the Bankruptcy Act and under the Burchill Act, which resulted in the present amended modification plan and arrangement. Numerous conferences were had with counsel and the matter was discussed among the officers and directors of the debtor and of Trinity Buildings Corporation of New York. Thereafter drafts of the plan were studied, discussed and revised. On the advice of counsel, said drafts were presented both to Guaranty Trust Company of New York in its

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capacity as mortgagee, and to the National City Company as the underwriter of the securities back in the year 1919 and to their respective counsel. Changes were made in the arrangement as suggested by both such parties and their counsel and finally, after the original plan was approved by the board of directors on March 15, 1939, it was promulgated, a copy thereof, of a combined form of proof of claim and acceptance, and a letter to certificateholders, dated March 15, 1939, being mailed to all known holders of share-certificates.

Q. Did something happen following the mailing of the modification, of the modified plan and agreement, dated March 15, 1939? I am talking now about the amended plan.

A. Yes, thereafter the officers—

Q. I want you to go to your memorandum IX. A. Immediately following the mailing of the modification plan and arrangement dated March 15, 1939, to all known holders of share certificates, the debtor communicated with the large holders of share certificates, among which were the following—

Mr. Rickaby: Just a moment. Your Honor, I do not see what that has to do with the fairness of the plan. I believe this witness is about to read a prepared statement, that he communicated with various banks and trust companies and asked for their consideration, and as a result evolved this plan. I do not think that has anything to do with the matter.

Mr. Hartfield: It has, to show that the amended plan was the result of conferences with and consultations with important holders of these share-certificates. That is what we want to show.

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The Court: You would want to show that, certainly.

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Mr. Hartfield: Yes, that is all.

The Court: Counsel does not want the witness to read from any prepared statement.

Mr. Hartfield: But he certainly has to refresh his recollection as to the list of those people he communicated with, and he must use the statement for that purpose only.

Mr. Rickaby: My point is, if he communicated with ninety per cent and they accepted it, but it was not accepted by the other ten per cent, it cannot be approved.

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The Court: Was it fair in its origin? That is the thought I think in back of the offer of the testimony. Whether or not any modifications were made at the suggestion of any large holders of Share Certificates is the purpose.

Mr. Hartfield: Yes, that is right, your Honor.

The Court: And then I suppose you will show what those modifications were, is that it?

Mr. Hartfield: Yes, sir. And the Circuit Court of Appeals, you know, has stated that the acceptance of the plan by the parties interested is strong evidence of its fairness, and we want to show not only was there acceptance but there were changes in the terms.

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The Court: I will permit him to show what happened after the circularization.

Mr. Rickaby: We had ninety per cent in the Barclay case in the Second Circuit.

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Mr. Hartfield: That is quite different there.

The Court: In that case there was some provision in the reorganization of the corporation itself, a provision under which the stockholders got something, and I believe that the record indicated there wasn't any equity or anything that represented the stock, anything of value.

Mr. Hartfield: And the point is, the creditors were getting less than a hundred cents, and they were giving something to the stockholders, none of which is present here.

The Court: The bonds were being reduced, I believe, as well as interest.

Mr. Rickaby: They got preferred stock in place of the bonds, but the stockholders had some stock which was concededly worth nothing.

The Court: I will have you brief that. I will take this in the meantime, to show the origin of the plan and how it was that amendments to the plan were made, what prompted those amendments, the source or the group who made the suggestion, and then we will have the whole picture, because one of the things the Court must determine is whether or not the plan is fair and equitable, and I think it may have a bearing on that point, if it is shown how the plan was evolved and how amendments to the plan were made.

Mr. Rickaby: Your Honor, just for the purposes of preserving the record, I object, and may I have an exception?

The Court: Yes. Proceed.

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A. (Continuing). Among the large holders of share certificates communicated with were the Savings Bank of Baltimore, with \$300,000 principal amount;

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Guaranty Trust Company of New York, either as Trustee for various personal trusts, or as Agent,	\$191,000;	
The President and Fellows of Harvard College,	\$122,000;	
Investors' Syndicate	\$101,000;	
Paterson Savings Institution	\$100,000;	
Reliance Insurance Company	\$100,000;	
Equitable Life Assurance Society	\$ 99,000;	
Carnegie Foundation for the Advancement of Teaching—	\$ 98,000;	716
United States Trust Co. of N. Y. (either as Trustee for various personal trusts, or as Agent)	\$ 51,000;	
City Bank Farmers Trust Co. (either as Trustee for various personal trusts, or as Agent)	\$50,000;	
Columbian Life Insurance Co., Boston	\$50,000;	
New York Foundation	\$40,000;	
National Commercial Bank & Trust Co. Albany (either as Trustee for various personal trusts, or as Agent)	\$40,000;	
Fidelity-Phenix Fire Insurance Co.	\$25,000;	717
Continental Insurance Co.,	\$25,000;	
Artisans' Savings Bank, Wilmington, Del.	\$25,000;	
Wilmington Trust Co., Wilmington, Del. (either as Trustee for various personal trusts, or as Agent)	\$25,000;	
Markle Banking & Trust Co., Hazelton, Pa.	\$25,000;	

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Camden Fire Insurance Co., Camden, N. J.,	\$25,000;
Northwestern Insurance Co., Milwaukee,	\$25,000;
Fulton Trust Co., N. Y. City (as Trustee for personal trusts)	\$25,000;
Great American Fire Insurance Co.	\$23,000;
Schuylkill Trust Co., Pottsville, Pa.	\$20,000.

After several telephone conversations and one personal talk with Mr. Austin McLanahan, president of the Savings Bank of Baltimore, during which it was explained to Mr. McLanahan that the various institutions all appeared to have different suggestions for constructive changes in the Plan, we were advised by Mr. McLanahan that he had written personal letters to representatives of each of the above named institutions as well as to several others, suggesting that a meeting be held at the office of the Guaranty Trust Company of New York, at which only representatives of the institutions would be present, and at which the various suggestions could be crystallized and submitted to the Company. We were advised that such meeting was held in the morning of April 21, 1939, and thereafter Mr. Beinecke, president of the U. S. Realty & Improvement Company; F. M. Sanders, executive vice-president of the U. S. Realty & Improvement Company, and I were invited to meet such representatives and receive their suggestions. The invitation was accepted and the suggestions received and considered, and as these suggestions appeared to the Board of Directors of the Realty Company as well as to the Board of Directors of Trinity Buildings Corporation to be fair and equitable and feasible, they were accepted, and, under date of May 1, 1939 an Amended Modification Plan and Arrangement was mailed all known holders of Share Certificates.

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Q. Is this Amended Modification Plan and Arrangement the paper dated May 1, 1939, to which I have referred heretofore, and which is the Amended Modification Plan and Arrangement which this Court is asked to approve in this present proceeding? A. Yes.

Q. Is the letter which accompanied that amended modification plan, the letter dated May 6, 1939, which I now show you, being a letter from the President of the Triptity Buildings Corporation, addressed to the Share Certificate holders? A. Yes, sir, this is the letter that accompanied it.

Q. Does that letter summarize the changes in the original plan which resulted from that meeting held at the office of the Guaranty Trust Company, called by Mr. McLanahan, the President of this Savings Bank of Baltimore? A. Yes, sir.

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Q. Can you very briefly summarize the changes that were made in the original plan at the request of Mr. McLanahan and as a result of that meeting held with the representatives of these large holders of Share Certificates? A. Yes, sir. The fixed interest was increased from $2\frac{1}{2}\%$ to 3% and the contingent interest, or interest if earned, and payable at maturity, was changed from $2\frac{1}{2}\%$ to 1% per annum until July 1, 1944, and from $2\frac{1}{2}\%$ to 2% thereafter until maturity.

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The maturity of the obligation was extended for ten years and one month instead of for twenty years and one month.

The redemption and sinking fund paragraph was amended to provide in lieu of a sinking fund of two-thirds of all available net earnings after payment of deposit in the Im-

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provement Fund and additional interest in substance as follows: Until the principal amount of the obligation is reduced to \$2,500,000 all available net earnings after deposit in the Improvement Fund and payment of additional interest are to be used for the retirement of share certificates or new bonds provided that the net current assets or cash of the Company shall not be decreased below \$50,000. In addition, no dividends are to be paid by the new company until the principal amount of the obligation shall have been reduced to \$2,500,000 and thereafter no dividends shall be paid in excess of amounts used for retirement of bonds and in no event in excess of \$50,000 per annum.

Q. And that is the guarantee which is now annexed to the amended modification plan and agreement, being the form which appears following page 15 of this paper, is it not? A. Yes.

Q. And that is the guarantee, or form of the guarantee which you agreed upon with these representatives of these large holders of the outstanding share certificates? A. Yes, sir.

Q. What other change was made?

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The Court: Suppose you let us know what that guarantee is. After all, this proceeding centers around that doesn't it? What is the new guarantee in place of the old?

Mr. Hartfield: Leaving out the recitals, the guarantee is that "Realty for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, as mortgagee aforesaid, its successors and assigns, and to the holders and registered owners from time to time

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of certificates for shares in the aforesaid First Mortgage loan, the due and punctual payment by Trinity Buildings Corporation of New York of (a) the principal of such loan with a maturity of July 1, 1949, as and when the same shall become due and payable whether at such maturity or by declaration under the terms of the obligation as modified under the aforesaid amended modification plan and arrangement; (b) interest on such First Mortgage loan at the rate of 3% per annum commencing December 1, 1938, and payable on July 1, 1939 and semi-annually thereafter; (c) additional interest in an amount equivalent to the sum of 1% per annum for the period December 1, 1938 until July 1, 1944, and of 2% per annum for the period July 1, 1944 until July 1, 1949, of outstanding certificates for shares and payable on July 1, 1949, to the extent not theretofore paid."

We have put the guarantee in as simple and plain terms as we could ourselves devise, and which were satisfactory to the representatives of these large holders of share certificates.

Q. Will you go ahead with other modification? A. The provision for amendment of the new guarantee or the new indenture by written consent of holders of 66⅔ per cent of outstanding obligations was limited by a provision that no modification could be made if holders of 20 per cent or more should dissent in writing therefrom.

Expenses: the debtor agreed to reimburse Trinity for its expenses up to, but not exceeding \$25,000 in respect of the Burchill Act reorganization.

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Q. After you had agreed with these representatives of the large holders of outstanding share certificates to those changes, they were incorporated in the amended modified plan and were circulated to the share certificate holders?

A. Yes, sir.

Q. After you sent out the plan, did you agree to certain interpretations and the relinquishment of reserved rights by three certain letters, which I now show you, one a letter of the Trinity Buildings Corporation, and the United States Realty & Improvement Company, dated May 29, 1939, addressed to the Guaranty Trust Company, of New York, not as mortgagee but in its individual capacity as a bondholder? Did you, on behalf of the Trinity Buildings Corporation and United States Realty and Improvement Company, cause that letter to be delivered? A. Yes, sir.

Mr. Hartfield: I offer in evidence that letter.

The Court: Summarize it first.

Mr. Hartfield: We forego the right, Your Honor, under the Burchill Act, to have the upset price, to be fixed for the sale of the property, fixed if anything in excess of the amount due on the mortgage and interest. In other words, if anybody will come in on that Burchill reorganization plan and bid more than the amount due on mortgage and interest, we are not permitted to bid anything more. We forego the right to bid anything in excess of that sum.

The Court: What is the date of that letter?

Mr. Hartfield: May 29, 1939.

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Mr. Rickaby: I call your Honor's attention to the fact that that is practically a concession that there is no equity there.

733

The Court: No, I think that meets one of the objections I read some place in the papers that were submitted to me, I think on the application to intervene, that one group of certificate holders represented by a committee object on the ground that it might be possible in the Burchill Act Proceeding to set an upset price that would be so high that it would exclude a bid that would take care of certificate holders and let them out.

Mr. Bardusch: That was one of the objections raised by our committee initially early in May.

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The Court: All right; this letter is May 29, 1939?

Mr. Hartfield: May 29, 1939.

The Court: That was intended then to meet your objection.

Mr. Arkush: We also have the same qualification, your Honor.

The Court: You make the same objection?

Mr. Arkush: On that same point.

The Court: Apparently they have agreed to an amendment. They have gone on record that it is not their purpose to ask that an upset price in excess of the amount due for principal and interest on the mortgage be fixed in the Burchill Act proceeding. If formal amendment to the plan is thought necessary, they are prepared to have that amendment.

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Mr. Hartfield: I do not think it is necessary and,

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of course, the reason it was put in was that the United States Realty & Improvement Company is a creditor and someone might say "you could use your claim for that purpose," and that provision is to avoid that. What we have done is to file this paper as an interpretation of what we understand that agreement to mean, so as to obviate the objections that were made.

Mr. Rickaby: When we are talking about upset prices, there is a great distinction between an upset price under the Burchill Act and an upset price in Federal procedure.

The Court: Upset price represented by the principal plus unpaid interest on the certificates is the upset price.

Mr. Rickaby: I appreciate that, your Honor, but I am calling your Honor's attention to the fact that the section of the Real Property Law, commonly known as the Burchill Act, requires the Court to fix a minimum price and a maximum price.

The Court: Yes.

Mr. Rickaby: And there is no chance in the world, in a Burchill Act proceeding, of the Court fixing a higher price for the trustee to bid than full principal and interest.

The Court: Or for anybody to bid.

Mr. Rickaby: Yes, sir.

The Court: Then there wasn't anything to the objection.

Mr. Rickaby: I did not make the objection.

Mr. Hartfield: But if there was anything to the objection, it has been met.

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Mr. Arkush: Just to keep the record clear, whether what the Court would find in the Burchill Act proceeding might have been influenced is the very fact that the plan specifically reserves to Realty the right to increase the maximum amount of the upset bid by its interest to ten million dollars.

739

Mr. Hartfield: That is an incorrect statement. The plan reserves the right to apply to the Court in the Burchill proceeding to raise the upset price.

Mr. Arkush: That is right. It seems to me, I haven't had Mr. Rickaby's experience in court, if the court had been told that a large amount in number and amount consented to this reservation, the court would have fixed a higher amount.

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Mr. Rickaby: If they could have raised more they would have paid the bonds.

The Court: I must take a practical view of the whole thing, and I suppose the bondholders would like to be paid the amount of their bonds, too.

Mr. Rickaby: Very much.

The Court: And the interest, even though in the present money market they cannot get $5\frac{1}{2}\%$ on their money.

Is there any three per cent money downtown which is secured?

741

Mr. Hartfield: If it is well secured, the borrower can write his own ticket.

The Court: At any rate, the letter was written for the purpose of meeting the objection made by one of the committees.

Mr. Hartfield: Yes.

(Marked Debtor's Exhibit 7 in evidence.)

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Mr. Hartfield: I now offer in evidence a letter dated May 2nd, 1939, addressed by the President of the U. S. Realty & Improvement Company to Mr. Austin McLanahan, The Savings Bank of Baltimore, and the substance of that letter is, I submit, that it is intended that holders of the share-certificates should have representation both on the board of directors of the U. S. Realty & Improvement Company and of the Trinity Buildings Corporation, but that as nobody had been designated to represent the certificates, they would not be included in the amended modification plan and agreement, but that the company committed itself that there should be representation of the share-certificate holders on the boards of both the Realty & Improvement Company and the Trinity Buildings Corporation, and I offer this in evidence as an exhibit.

(Marked Debtor's Exhibit 8 in evidence.)

Mr. Hartfield: We now offer in evidence a letter dated May 22, 1939, signed by the Trinity Buildings Corporation of New York, by its president, addressed to Paterson Savings Institution of Paterson, New Jersey, to the effect that the corporation will request the Supreme Court in the State Burchill Act proceeding, when that Court approves the form of the First Mortgage Indenture, to have it contain a provision to the effect that any moneys that are on deposit for the so-called improvement fund, which the amended plan provides for, shall not be used to pay fixed interest without the consent of the corporate trustee

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under the new mortgage to be given in the Burchill
Act proceeding.

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(Marked Debtor's Exhibit 9 in evidence.)

The Court: Explain the effect of that.

Mr. Hartfield: This plan provides that there shall be set aside to pay interest a certain amount to make improvements in the building, because improvements are necessary, and a particular fund is necessary to make tenant changes, where he requires different partitions and different spacing of the offices, depending on whether it is a bank or law office. In order to meet tenants' needs, everybody agrees it is highly desirable there should be this improvement fund. One of the holders of one of these certificates has had the idea that later we might go on for six months' time and not need the fund and then try to pay the obligations under these bonds. This is an agreement that this fund shall not be used to pay fixed interest without getting the consent of the corporate trustee under the mortgage. To assure that this money won't be used for any other purpose other than as outlined, this certificate holder thought it desirable and necessary to make this provision.

746

The Court: So the guarantor would not have the benefit of it.

Mr. Hartfield: That is right.

The Court: Indirectly on a guarantee.

Mr. Hartfield: Yes, sir.

The Court: That is what it amounts to. So the

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money would have to be used for that purpose, and you would have to make good the difference, if any difference existed, in order to pay the three per cent.

Mr. Hartfield: Fixed interest which we unconditionally guarantee.

The Court: And the only circumstances under which any part of the \$50,000 could be used to pay interest would be with the approval of the corporate trustee.

Mr. Hartfield: Under the mortgage. I am told that I was wrong in saying that included in these capital changes and improvements that this money was used for tenant partitions. That is treated as an operating expense. It means permanent improvements, such as elevators and stairs, you know, permanent parts of the building, not tenant changes. I would like to correct my statement to that extent.

The Court: And your plan so indicates?

Mr. Hartfield: That is what tenant changes are, treated as an operating expense.

The Court: Not ordinary wear or upkeep.

Mr. Hartfield: Yes.

Q: Have you produced the annual reports of the United States Realty and Improvement Company for the years 1930 to 1938, both inclusive? A. Yes, sir.

Q: And they are the reports which were regularly mailed to stockholders of the U. S. Realty & Improvement Company at the end of each fiscal year? A. Yes.

Mr. Hartfield: I offer as one exhibit these reports covering the years 1930 to 1938, both inclusive.

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(Nine pamphlets marked Debtor's Exhibit 10.)

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Mr. Hartfield: The witness is subject to cross examination.

* * *

Cross Examination by Mr. Bardusch:

Q Mr. Flohr, you testified that there were outstanding, I believe the figure was, \$1,203,500 of G.A.F. Realty 6% Debenture Bonds, did you not? A. Yes, sir.

Q. Was the G.A.F. Realty reorganized a few years ago? A. Yes, sir.

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Q. Under section 77B? A. Yes, sir.

Q. And previous to that reorganization these bonds had been guaranteed by the United States Realty & Improvement Company, if I understand correctly? A. Yes.

Q. Under the plan of that reorganization, were they exchangeable for any other type of debenture bond? A. Yes.

Q. What is the name of that other bond for which they are exchangeable? A. Six per cent Sinking Fund Debentures due January 1, 1944 of the United States Realty & Improvement Company.

Q. When were they created? A. I cannot tell you the exact date.

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Q. Were they created on or about July 1, 1935? A. (No answer.)

Q. Well, I show you—you are familiar with the records of the Realty Company, are you not? A. Oh, yes.

Q. I will show you that and ask you if that is not a copy of the instrument creating the debenture bonds? A. Yes sir,

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that is a copy. This was created—the trust agreement is dated as of July 1, 1935, but I believe it was created some six months later than that.

Q. That is at least its date? A. Yes.

Mr. Bardusch: I offer in evidence a copy of the indenture of the United States Realty & Improvement Company with the National City Bank of New York as trustee, dated as of July 1, 1935, under which were created \$2,662,500 principal amount 6% Sinking Fund Debentures dated as of July 1, 1935, and maturing January 1, 1944.

Mr. Hartfield: I suppose you will stipulate that it is under that indenture that there are now outstanding \$1,135,500, which appears on this Debtor's Exhibit 4?

Mr. Bardusch: Yes, I shan't challenge the amount outstanding.

Mr. Hartfield: I just wanted to connect the two.

The Court: I have concluded, in view of the different viewpoints of the various committees, creditors' committees, that the best thing for me to do would be to permit you to intervene.

That rule you mentioned, counselor, would indicate that under Rule XI, subdivision 9, it was contemplated that committees might file proofs of claim.

Have you the exact wording of it?

Mr. Rickaby: Yes, your Honor.

The Court: May I have it, please.

Mr. Marx: Rule XI-9 refers only to where the committee wishes to accept the plan, I believe.

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The Court: Yes, desire to file acceptance to an arrangement. 757

Mr. Marx: Yes.

The Court: Well, they might file an acceptance to a proper arrangement.

Mr. Rickaby: It contemplates the existence of an unofficial committee which may be favorable. If it contemplates one favorable, it must naturally follow there must be an unfavorable one.

Mr. Hartfield: Can there be any doubt that an absolute condition requisite to making this Rule XI-9 applicable is that it is a committee or person representing more than twelve creditors who desire to file acceptances to an arrangement? These committees here do not desire to file acceptances to an arrangement. They are here, at least two of the committees, for the purpose of opposing the acceptance of an arrangement. 758

The Court: I do not know that they are here to oppose the acceptance of any arrangement.

Mr. Bardusch: No, we are not. ✂

The Court: They may be willing to agree to what they consider a proper arrangement.

Mr. Hartfield: But, your Honor, I do not really care so much. I want you to let these people be heard. I did not object so much to the intervention— 759

The Court: You did not object when the motions were returnable.

Mr. Hartfield: Therefore I do not want to be heard now, but I don't want you to put it on what I conceive to be an improper ground, which is Rule XI-9.

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The Court: On what ground did you not oppose their application for intervention?

Mr. Hartfield: Simply on the general ground that in a proceeding of this kind if the Court were satisfied that the committees were acting in good faith—

The Court: I think they are.

Mr. Hartfield: And I have not suggested that they are not, that the Court would like to hear from any party, you know, just so long as there wasn't too much of a duplication. We want everybody to be heard. Therefore we did not object to the application for intervention, but it seems to me I should not sit by and let you put it on that rule when I am sure it has no application to this situation.

The Court: In view of the difficulty of electing a committee at this first meeting of creditors, and we have had that shown in the discussion that took place this afternoon, I think the best way to give every committee a standing would be to permit the intervention.

Mr. Bardusch: I have offered this in evidence. I ask that it be marked.

(Marked Earl Committee Exhibit A.)

Q. You are familiar with this indenture, are you not?

A. Yes.

Q. Under the terms of that there isn't any collateral security? I mean, you remember that, don't you? You are an officer. That is knowledge of all—

The Court: Just let him answer one question at a time.

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Q. (Continuing) Under that instrument? A. I am afraid I could not answer that question directly. You know what is in this; I don't know; I know that there is collateral security but whether it is mentioned in there or not, I can not answer.

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The Court: Suppose you answer this; when was the collateral put up?

Mr. Bardusch: I am coming to that, if your Honor please. I beg your pardon.

The Court: When was the collateral put up?

The Witness: The collateral was put up at the time of the reorganization of the G.A.F. Realty Corporation and I believe was put up at the instance of the court that had jurisdiction at that time.

764

Mr. Marx: I am familiar with that proceeding, and I will straighten the witness out, if Mr. Bardusch will permit.

The Court: Yes.

Mr. Marx: The plan of reorganization provided at the time that the 6% Debentures of G.A.F. Realty Corporation, guaranteed by United States Realty & Improvement Company, should be exchangeable for debentures with identical terms of United States Realty & Improvement Company. To secure all those debentures, those that were not exchanged, and those that were exchanged, the stock was put up. Therefore a separate pledge agreement was drawn up at the same time so that both indenture issues, which would only be outstanding in the same amount, because, as they were exchanged, one of the issues

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would be increased and the other decreased. Therefore the separate pledge agreement was simultaneously executed to secure both issues.

The Court: Did the plan of reorganization so provide?

Mr. Marx: Yes.

Mr. Rickaby: May I inquire, your Honor, whether it was compulsory on the holders of the debentures of the G.A.F.—

Mr. Marx: No.

Mr. Rickaby: To exchange, or could they keep the old ones and at their option exchange?

Mr. Marx: Yes.

The Court: But there was a separate pledge agreement?

Mr. Marx: Yes.

The Court: Although the debenture as issued did not provide for security as part of the reorganization?

Mr. Marx: The plan provided for security.

The Court: And the pledge agreement?

Mr. Marx: Was approved by the court.

The Court: Have you a copy of that?

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Mr. Bardusch: I offer in evidence agreement of pledge, dated February 10, 1936, between U. S. Realty & Improvement Company and the National City Bank of New York.

(Marked Earl Committee Exhibit B.)

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The Court: What I wanted to have explained to me, in view of the objections made in some of your circulars or in the applications for leave to intervene, was whether or not the deposit of this security was something done with an eye to this proceeding, to make one who otherwise would have been an unsecured creditor, and therefore entitled to file proof of claim and vote, a secured creditor. Apparently this pledge agreement removes that doubt, because that was something that was in the dark recesses of my mind, where suspicion sometimes lingers, but that suspicion has found a place of habitation; a home, and I am glad to see it has been dispossessed from the dark recesses. Go ahead.

Q. Mr. Flohr, it was under this pledge agreement, just referred to and introduced in evidence as Earl Committee's Exhibit B, that 8000-odd shares, 8576 shares of the Class B Common stock of the Fuller Building Corporation, were pledged as— A. I believe there were voting trust certificates representing that stock pledged.

Q. That was the same. Voting trust certificates for 8576 shares of Class B Common stock of the Fuller Building Corporation? A. That is right.

Q. Was the collateral that was placed back of this debenture bond issue? A. Right.

Q. That is also the same collateral that, under that plan of reorganization, is available for the G. A. F., that is what you called it, debenture bond issue outstanding, is that right? A. Right.

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Mr. Bardusch: I offer in evidence trust agreement dated as of January 1, 1929, between G. A. F. Realty Corporation and the National City Bank of New York, as trustee, providing for \$3,000,000 15-year Sinking Fund 6% Gold Debentures.

(Marked Earl Committee Exhibit C.)

Q. Is the security just mentioned, the 8576 shares voting trust certificates for the Class B stock the only security given or pledged to secure the debenture bond issue of Realty as well as the G. A. F.? A. Yes, sir.

Q. You testified this morning, did you not, that the G. A. F. Company was virtually out of business? A. Inactive.

Q. And you carried the stock at a nominal sum, am I right? A. Yes, \$500.

Q. And that it had no assets? A. It has \$375 in the bank.

Q. But that is all its assets are, right? A. Surely.

Q. You also testified, did you not, that the stock of the Fuller Building Company pledged as collateral for these bonds also has no value? A. Very little.

Q. Very little value. Didn't you say this morning that that stock had no value?

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Mr. Marx: It is voting trust stock.

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The Court: What is the name of the corporation?

Mr. Bardusch: Fuller Building Corporation.

Mr. Marx: G. A. F. is the predecessor of the Fuller Building Corporation under the 77B plan.

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Mr. Bardusch: Let us have it straight, but the voting trust certificates represent shares of stock, Class B stock of Fuller Building Corporation?

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Mr. Marx: Yes.

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Mr. Bardusch: We are agreed on the names of the companies. I call upon you to produce the so-called Class B stock agreement that is referred to in the pledge and is referred to as well, I think, in your petition.

Mr. Marx: I haven't it here. I will send down for it. You did not give us any notice to produce.

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Q. Mr. Flohr, have you seen the petition in this proceeding before? A. Yes, sir, I have.

Q. Did you confer with counsel when it was prepared? A. Yes.

Q. You have been over it a good many times, have you not? A. I would say so. I was at various conferences.

Q. You know pretty well what is in it? You have read it? A. Yes—not every word. I hope you will give me a chance to refer to it, if you wish to refer to anything in it.

The Court: What paragraph is it?

Mr. Bardusch: Ninth, I think it is.

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The Court: Call his attention to it.

Q. Will you read that paragraph?

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Mr. Hartfield: What is the paragraph?

Mr. Bardusch: I think it is nine, Colonel.

Q. (Continuing) You have read that? A. Yes.

Q. You are quite familiar with it? A. Yes.

Q. You say that the only security back of the so-called debenture bond issues are these voting trust certificates for the Class B stock? A. Yes, sir.

Q. You also said that the stock had no value? A. I said that it had no realizable value.

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Q. That was not your testimony this morning. You said it had no value. There is an allegation I am going to read to you, "No other creditors or class of creditors are affected by the arrangement because the debtor proposes to and is able to pay all other of its debts, secured or unsecured, as they mature. All other funded debt of the debtor is secured and the only other unsecured debt besides the aforesaid guaranty is set forth in the schedules hereto annexed, and as the result of the current operations of the debtor, and the debtor proposes to pay such debts, secured or unsecured, as they mature." Do you say these bonds are secured? Do you agree these bonds are secured? A. Yes, sir.

Q. Fully secured? A. Oh, they are secured.

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Q. You said they had no value, did you not, and in spite of that you say they are secured? A. They are secured, yes, sir.

Q. And by what? A. By this stock.

Q. What is the stock worth? A. Very little at the present time. It might have some potential value.

Q. Mr. Flohr, toward the end of your direct examination

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you testified as to a list of institutional holders, so-called, who were at the conference and who you say agreed upon the amended plan. A. Yes.

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Q. Did all, each and every one of those file an assent to this plan? A. No, sir.

Q. Several of them did not, did they? A. I believe so.

* * * * *

Mr. Bardusch: That is all, if your Honor please. I have finished, but I would like to put that other exhibit in, for which they are sending.

The Court: Yes, when it arrives.

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Cross Examination by Mr. Rickaby:

Q. Mr. Flohr, in reference to the Debtor's Exhibit 4, will you tell us how you came to prepare that exhibit. A. I was told I was going to be asked about the assets of the United States Realty and Improvement Company and I would be asked to give my opinion as to their value, and I prepared this exhibit, knowing that I would have to do that.

Q. I mean, who told you that? A. Our attorneys.

Q. Did you confer with anybody else about it, any of your other officers and associates, directors? A. Oh, I may have, yes, about some detail or other. I did—absolutely, I did.

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Q. I mean, it was prepared in accordance with the instructions of the recognized officers and directors of the company, isn't that the fact? A. Well, I guess that is right.

Q. And was prepared with a great deal of care, wasn't it? A. Yes, sir.

Q. And after giving the greatest study that the facilities of your corporation afforded as to the values of the various

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items about which you have testified today? A. Yes, sir.

Q. In referring to paragraph 9 of the petition, the statement which was just read to you, you will recall it was read to you by Mr Bardusch, you say in effect there that the debtor proposes to pay all of its other obligations. A. Yes.

Q. That was likewise prepared after discussion with the directors and officers of the corporation? A. Yes.

Q. It was authorized by the board, in fact, that statement? A. Yes.

Q. And it was taken into consideration that you expected to pay these debentures of the G. A. F. Company and the debentures of the debtor for which those debentures are exchangeable, wasn't it? A. As they became due.

Q. Those were expected to be paid in full? A. As they became due, yes.

Cross Examination by Mr. Arkush:

Q. Who prepared the balance sheets as of December 31 annexed to the amended plan? A. Why, it was prepared by us and certified to, you might say. It was prepared by our accountants, Arthur Andersen & Company.

Q. Do those balance sheets also reflect the opinion of the board of directors of the debtor as to values? A. This is the December 31?

Q. December 31 and I refer particularly to the balance sheets of the debtor appearing on pages 12 and 13 of the amended plan.

Mr. Hartfield: They do not purport to be any statement of the opinion of value. This is a book balance

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sheet and purports to show only book values, and if you will read the note at the bottom, it says, "The amounts shown on this balance sheet with respect to investments and real estate do not purport to be present or replacement or realizable values." Nobody attempted to put those values as actual values. This is a book balance sheet and everybody examined it, but there is that note at the foot of it.

Mr. Arkush: I will ask the witness as to the note.

Q. I call your attention to the note referred to by Colonel Hartfield at the bottom of page 12, Mr. Flohr. Does that note represent the opinion of the officers and directors of the debtor? A. Yes, sir.

Q. Take the sentence, "Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amounts at which they are carried, particularly the investment in Plaza Operating Company." As I understand your testimony of this morning, you think that the investment in the Plaza Operating Company at the present time has no value, is that correct? A. No realizable value at the present time. I do not believe, if anything could be realized for it, that it would amount to anything.

Q. You were asked at the conclusion of your direct testimony whether this balance sheet, Debtor's Exhibit 4, represented in your opinion the fair value of the assets. Do I understand that you now modify your testimony to mean that you only meant the realizable value? A. Well, I am assuming that realizable and fair are the same thing, if we speak about today, I mean, what the asset is worth

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today, not what it might be worth next year or two years from now, I think that today. So that the fair and realizable value are the same thing.

Q. So in all your testimony as to values, you have not given any larger value than you think could be realized if the property were put up for sale today, is that right? A. Substantially.

Q. What other items were you referring to besides the Plaza Operating Company in the sentence at the end of the note on the bottom of page 12, what other items were there which undoubtedly had values in excess of the amount at which they were carried? A. Those carried at a dollar, they might have been worth \$50 or \$100, but not any substantial amount in excess.

Mr. Hartfield: Mr. Arkush, I know you want to be fair with the witness, but you pick out a part of the sentence. You see, what it says is, it is at present conditions in the real estate business—some book value. They do not purport to be present or replacement or realizable values. Then it says, "Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amount at which they are carried, particularly the investment in Plaza Operating Company." But, I mean, if you will read that as a whole, what they are trying to tell people looking at this balance sheet is that this is a book balance sheet; that they do not represent present or replacement values; that these equities are unquestionably based on present conditions of the real estate industry in excess of the market value but

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there are some items, like Plaza, that may have a value in excess of the nominal value with reference to the \$175,000 notes receivable, one dollar.

Q. Take the Plaza Operating Company, did you have any appraisal made of that as real estate? A. No, sir, not recently that I know of. I cannot remember the last appraisal or if there was one made.

Q. Your opinion, as I understand it, of the value of the investment in Plaza Operating Company is based entirely on the earnings records for the last few years, is that correct?

A. I would say on its present earning record, yes.

Q. You did not take into consideration any value of the land and buildings as such? A. No, sir.

Q. Your opinion as to the Whitehall Investment, I take it, is based entirely on the Brown, Wheelock appraisal, is that correct? A. Yes, sir.

Q. Do you know what factors they took into consideration in making that appraisal? A. I believe, I don't know, but I believe that they considered earnings almost exclusively in arriving at that value.

Q. What is the present tenant occupancy of the building now, percentage? A. It is approximately 90 per cent rented.

Q. That is higher than the Trinity Building? A. Yes.

Q. Taking this Debtor's Exhibit 4, the note attached on the second page, note 1, and particularly the sentence, "Some of these assets are included at no value or at nominal values, and, undoubtedly, some have potential values in excess of the amounts at which they are included." Does that represent the opinion of the officers and directors of the debtor?

A. I would say that that is my opinion.

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Q: When you say potential values, you refer to the possibility that the assets might be sold at higher prices at a future time? A. Yes, sir, I am taking cognizance of the fact that these are hard times and that these assets could not be sold probably for any amount in some instances, but a little recovery at some later date might prove of such benefit to them that they would have considerable value.

Q: You are a director of the debtor? A. Yes, sir.

Q: And you voted for this amended plan? A. Yes, sir, I did.

Q: In your opinion it is a fair plan? A. It is, sir.

Q: Do you base your opinion entirely on your opinion as to values today without regard to the future? A. I don't know whether I based it upon any values. I believe that the United States Realty & Improvement Company and the Trinity Buildings Corporation are agreeing to as much as they possibly can under the plan, and I believe what they are agreeing to is all that the bondholders can expect and do expect in most cases.

Q: Let us assume that in the future, and before the maturity of these proposed new securities that are offered to the certificate holders that Realty, the debtor, realizes considerably more than the values that you have put on its assets here, don't you think that some provision should be made that these certificateholders share in that good fortune? A. I do not know. Maybe they would rather have an investment at 4½ per cent or 5 per cent than to get their money back. I could not say.

The Court: No, he says, suppose some of the assets of the debtor, U. S. Realty & Improvement Company, increase in value during the period of the

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extension of the certificates under the Trinity Buildings Corporation mortgage, in view of the fact that United States Realty & Improvement Company is guaranteeing the payments of the principal and interest to a certain extent, don't you think that the increase in the value of other assets of the U. S. Realty & Improvement Company should inure in some way to the benefit of the certificate holders under the mortgage of the Trinity Buildings Corporation.

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Mr. Arkush: Let me withdraw that question. Perhaps—

The Court: I think what you have in mind is pretty clear. Suppose, for instance, this Whitehall Building investment or Plaza Hotel investment, whatever it may be, increases in value in the course of ten years for which the extension will be sought, then shouldn't there be some provision in the plan by which the extent of your guaranty will be increased?

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The Witness: I think that would come automatically, your Honor. If our assets go up, the guaranty becomes so much better.

The Court: Undoubtedly, the security in back of the guaranty, yes.

Mr. Arkush: Maybe I can carry the witness along right from there.

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Q. Well, in other words, as the assets increase, the guaranty gets better, is that true? A. Yes.

Q. Would you consider it unfair to provide that that increase in value, so far as realized, should be preserved for

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the benefit of these certificate holders and not dissipated in any way?

The Court: What do you mean by that?

Mr. Arkush: I mean, your Honor, suppose the Whitehall Building or the Plaza Investment or any of their other assets are sold at a rather favorable price, it seems to me in some way or other—and I have a specific suggestion which I am going to put to the witness in a moment—some way or other that improvement in the guaranty should be preserved and they should not be able to turn around and dissipate that profit.

Mr. Hartfield: It is this, as I understand it, maybe there should be an agreement that U. S. Realty should segregate all its assets for the purpose of making good this guaranty which, of course, would prevent the United States Realty & Improvement Company from borrowing any money and pledging these assets and use that fund for corporate purposes.

Mr. Arkush: I have not made the suggestion.

Mr. Hartfield: Of course, and the U. S. Realty & Improvement Company proposes to guarantee again, even though it may be relieved under the provisions of the moratorium law, it proposes to guarantee the principal of these notes and to guarantee a certain rate of interest. Of course, it expects to be able to make good its guarantee in the hope that springs eternal in the human breast, and certainly the breast of every holder, that there is going to be an improvement in value; that we are at the low of values, but to suggest that—

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Mr. Arkush: I haven't suggested anything.

Mr. Hartfield: You suggest it should inure to the benefit of these bondholders. It does, if the corporate funds for the payment of the obligations are increased. But to suggest, as I understood him to mean by his line of examination, that there should be a segregation and an earmarking, and that the corporation should not use its assets for its proper corporate purposes is not sound.

Mr. Arkush: I have not suggested that.

Mr. Rickaby: Isn't it a matter of law, really? What happens is, assume that Trinity Buildings subsequently sold for \$6,000,000, if that happy day comes—and that may come eight years from now. In the interval, under this plan the bondholders are chiselled down to 3 per cent interest and the United States Realty walks off with two or three million dollars, if that event happens. Probably won't, but if it does happen, that is just the way it affects these bondholders. That is a legal argument, of course.

Mr. Arkush: May I proceed?

The Court: No, no. Let us follow this out. Who has the stock?

Mr. Rickaby: United States Realty owns all the stock of the Trinity Buildings.

The Court: Isn't it pledged?

Mr. Rickaby: Not that stock. That stock is not pledged. It is a free asset in their hands. They did not give up that stock.

Mr. Hartfield: There is a strict limitation in the plan against paying dividends on the stock. We

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could not pay any dividends, you know, until the interest is paid, this improvement fund is paid, or we could not pay any dividends in excess of the amount for which we have applied this fund—in no event exceeding \$50,000 a year. It is suggested we might in some way loot this property. We could not possibly do it.

Mr. Rickaby: No, don't loot it, keep it there, but sell it for \$6,000,000 and then pay off the principal. They have only had 3 per cent interest and you have \$2,000,000 then, it is true bondholders have been paid off at their rate of interest, and you will get it.

Mr. Hartfield: You forget part of the rate of interest is added to the principal. At the end they receive it. They do not get fixed interest. It is added to the principal at maturity.

The Court: I suppose some provision could be put in the plan to cover that suggestion, that if the properties owned by the Trinity Buildings Corporation are sold for a sum in excess of—

Mr. Rickaby: Now we are getting somewhere.

The Court: —the principal amount of the mortgage, that the sum thus realized shall be first applied in the reduction of the mortgage by the purchase or acquisition of 50 per cent or whatever it may be, 25 per cent, of the holdings of each certificate holder, because they could not pay them off then—

Mr. Rickaby: Theoretically, suppose this happens—

The Court: —but they could reduce them.

Mr. Rickaby: —suppose this happens, and this is possibly optimistic, perhaps fantastic—

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The Court: It may be, counsellor, since we are talking now about an issue of \$3,700,000—is that it?

Mr. Rickaby: Yes.

The Court: And we are worrying about that.

Mr. Rickaby: Yes.

The Court: There is a possibility, and that is a thought that has been running through my mind, of this property earning more than what it is earning now. Apparently it is at a low ebb. Well, I thought that perhaps the plan could be strengthened so that those earnings would go to the certificate holders. There would be no dividends at all on the stock during the period of the extension of the mortgage. That may be in the plan already, I do not know. Wait, just a minute. Now, your suggestion is a helpful one and I think that perhaps something can be molded from it that will insure the use of any surplus of any sum realized on the equity in retiring the bonds. That is what you want?

Mr. Rickaby: Exactly. As a matter of fact, the debtor owning all the stock of the Trinity Buildings surrenders none of it; the bondholders take all the sacrifice, and the debtor, as the holder of all the stock of the Trinity Buildings, keeps all the hope. That cannot be done.

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By Mr. Askush:

Q. Mr. Flohr, how many shares of stock has the debtor outstanding? A. 900,000 shares.

Q. Is that stock paying dividends? A. No.

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14 Q. Has it paid dividends for some time? A. It hasn't paid dividends for some time.

Q. Would you think it unfair—

The Court: That is very indefinite. Tell us what you mean by that. What is "some time"?

The Witness: It is long enough so that I have forgotten when it was.

The Court: When the memory of men runneth not to the contrary?

I think you said something to the effect that since 1930 or 1931—wasn't it? There hasn't been any dividend since about 1931, I think it was.

Mr. Marx: Yes.

The Witness: 1931 was the last dividend. The last dividend was paid in 1931.

The Court: All right, go ahead.

Q. Is there any probability of dividends being paid in the future, say, in the next ten years, Mr. Flohr?

Mr. Rickaby: I object to that as calling for a conclusion; speculative.

Mr. Arkush: I withdraw that.

16 Q. On the basis of your estimate of earnings in the future, which is already in evidence, is there any possibility of dividends?

Mr. Hartfield: He carried his estimate only up to 1941.

The Court: That is as far as he went.

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Mr. Arkush: That is as far as my question goes.

Mr. Hartfield: That is all right.

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A. I do not think there is any chance that dividends will be paid before December 1, 1941.

Q. Do you think there is any reasonable probability within the next ten years of the Realty Company being able to pay dividends on its stock out of earnings of its subsidiaries or out of its profits?

Mr. Rickaby: I object to it as merely speculative and calling for a conclusion.

Mr. Arkush: We have had the guesses of the witness all day.

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Mr. Rickaby: Not for ten years.

The Court: Overruled. Answer the question.

Mr. Rickaby: Exception.

A. I cannot answer the question. I do not know.

Q. Would you go with me so far as to say that unless Realty sold some of its properties at a substantially greater value than you have placed on them, there would be no possibility of dividends?

Mr. Hartfield: I object to that, calling for something that may happen in ten years. Nobody can prophesy.

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The Court: Overruled. That is on a definite basis.

Q. (Read.)

The Court: To the Realty Company stockholders?

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Mr. Arkush: Right.

Mr. Hartfield: That assumes that there is no reclassification of the stock or anything of that kind?

Mr. Arkush: Yes.

The Court: Yes, as is.

Mr. Arkush: Yes.

A. I cannot conceive that there would be any dividends paid within the next ten years.

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Q. Then would you as a director object to this plan being amended to provide that there be no dividends paid while these certificates are outstanding? A. I don't know whether I would or not. I believe that I would object.

Q. You think it would be unfair? A. I believe that directors represent stockholders and I think I would not be doing my duty to the stockholders if I agreed to any such plan.

Q. Do you think it would be unfair if Realty improves its position to such an extent that it would be able to pay dividends that these certificateholders should not first be paid off? A. I think the plan is fair the way it is.

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Q. But you told me that you based the plan on these values that you placed on these assets. Would it be unfair if substantially greater values are realized to protect these certificateholders to that extent, that the excess realization should not be paid out to the stockholders of Realty without paying off these certificates?

Mr. Hartfield: Mr. Arkush, in asking that question, have you taken into consideration the undistributed profits tax situation, insofar as they may have to pay a very large percentage to the government if they

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made an agreement not to pay out dividends? And I would like to ask, as a matter of argument, how would it be possible for these other assets to go up in value and not have improvement in the rental value of these buildings? Anybody who knows this situation knows that for the next few years these two buildings are not going to pay even fixed interest on these bonds, and United States Realty is going to have to go into its pockets and get up money to make good its guarantee on even the fixed interest, because these buildings are not going to pay it, because new leases are not made on the attractive terms that we would like to get, but we have to rent the building. We have to deal with certain factors, fixed factors, what is being produced by the building. If other values go up, this building value will go up.

Mr. Arkush: Not necessarily. Whitehall is in a different situation. Factors may come into existence that may enable them to sell those buildings without improving those buildings.

The Court: What you are doing in this proceeding is to reorganize the guarantee that you have given, isn't it?

Mr. Hartfield: I wouldn't say it is to reorganize it. We are making an arrangement with our creditors with respect to this guarantee.

The Court: That is, I expect you are making an arrangement with respect to that guarantee?

Mr. Hartfield: Yes.

The Court: You yet have to go to the State court.

Mr. Hartfield: To get a reorganization of the Trinity Buildings obligations.

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The Court: In respect of this mortgage?

Mr. Hartfield: That is right.

The Court: How do we know what terms the State court may impose? That is, I think, one of the main difficulties about this proceeding and for the consummation of it in advance of the other.

Whether the two could be carried through at one and the same time, and the two courts cooperate to the extent that what is arranged for the bonds by the State court would apply to the guarantee here, at least to the amount of the interest and the like, that would be one way of meeting it. One of the things that has given me some concern is how I can reorganize the guarantee with the reduced interest rate until you first have the reduced rate interest fixed by the State court in reorganization.

Mr. Hartfield: It is a condition, ~~you~~ know, of the Burchill Act.

Mr. Marx: I am partly responsible for that, and I think my reasons are logical. In the first place, we wanted a precedent in this court to go to the State court with. In the second place—

The Court: The two courts could work together on it.

Mr. Marx: In the second place, your Honor, unless we get this done here and consummated, why, we are going to be running around, chasing after these fellows with powers of attorney. There is merely an extension of a limitation of this guarantee.

The Court: It is conditional upon.

Mr. Arkush: No, it is made absolutely.

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Mr. Marx: It is absolute. In other words, if this case goes through, the other will have to go through—no, will not have to go through, but the pressure will be put on it.

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The Court: We would not want to operate in that way. We would want to cooperate, not to coerce.

Mr. Marx: It is not coercion. We have a state of facts now which may change to some extent. We figured that when this was settled in this court it would go through the Burchill court without any hitches.

The Court: I know, but the point is this, counsellor, that we cannot be sure of that.

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Mr. Hartfield: But your Honor has in mind, don't you, that by this arrangement, although under the moratorium act U. S. Realty & Improvement Company may have no legal obligation, we are making an absolutely new commitment, an agreement, which we are asking your Honor to determine is fair and equitable. This agreement of ours, agreed to by a majority of amount and number, which the courts say on its face is strong evidence of its fairness, is presented to your Honor. Here we come to make an independent agreement when we are not under any legal obligation to make it, when we know it is a contribution by us of a very considerable amount. It is in no sense conditioned on the Burchill plan reorganization because if the Burchill plan stays as it is, and they do not do anything about the mortgage, which I cannot conceive to be so, our obligation to pay this guarantee; which is an independent thing, which sur-

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vives the moratorium act, which we are contributing, and if your Honor finds the plan is fair and reasonable, upon the testimony, it will inure to the benefit of these noteholders and we will be required to pay the interest specified in this plan. There will be added to the principal at the maturity the amount that we have guaranteed and we cannot hope to get any equity out of this property until the bondholders have received, not only the principal and the fixed interest, but also this additional interest.

The Court: But, Colonel; don't you see that you have more than that in your plan? For instance, you have a provision that \$50,000 of the income of the property be set aside for certain structural improvements or, we will say, structural replacements. All right. Now, how can you bind the Trinity Buildings Corporation to anything of that kind? That is one of the conditions of your plan here, however, for the U. S. Realty & Improvement Company. What would be the objection—

Mr. Hartfield: Your Honor has in mind that that provision about the \$50,000 is only effective in the event that a plan under the Burchill Act provides for that? The noteholders have agreed to that. The language of it is that "In the event the plan is consummated under the Burchill Act, all available net earnings for each calendar year, until and including the year 1948, but not in excess of \$50,000 for each year, shall be, on or before March 10 of the succeeding year, deposited in a special account." That feature is conditioned on the Burchill plan. But our guarantee.

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once you approve it as fair is unconditional itself— if this property was worth the amount of the mortgage. Then the guarantee becomes an absolute binding guarantee and you cannot wipe that out by using the word chisel, which one counsel has been using so frequently, which gives it effectiveness.

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Mr. Rickaby: Emphasis.

Mr. Hartfield: Irrespective of its position as a creditor in this thing, irrespective of the fact that the earnings of these buildings are now insufficient to pay fixed interest, to pay this amount, we do it, and we run the risk of there being a Burchill plan being made effective. It is true one of the provisions will not be effective unless the Burchill plan also provides for it but in no way affects the validity of our guarantee.

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The Court: What objection would there be to having Trinity Buildings reorganized under Chapter X, reorganizing this particular mortgage under Chapter X in this court? Then the two proceedings could run along hand in hand. Under 77B you could reorganize and I assume the same is true under Chapter X, you could reorganize one of these mortgages, and you could reorganize the guarantee and the guarantee would stand.

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Mr. Rickaby: If your Honor please—

The Court: That obligation of the third party could not be dealt with in that proceeding.

Mr. Arkush: May I continue my examination?

The Court: No, you may not. This is basic and it means more than the mere matter of whether one asset is worth \$100,000 or worth \$50,000. You see, if

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the other proceeding were started in the State court, then I could confer with the Judge in the State court or he could confer with me and we could try to work out some solution of the matter that would not make one conditional upon the other, the other not having been started as yet, but would terminate both of them with the same conditions set forth. One in the arrangement in this court under Chapter XI with respect to the guarantee and the other in the State court under the Burchill act in respect of the mortgage. That, I can see, is a logical way of handling the matter. Either have both proceedings in this court, one under Chapter X and the other under Chapter XI, or else start your State court proceeding and let it run along with this proceeding in the Federal court and work it out concurrently, that is, work out the two plans concurrently. It seems to me more practical, Colonel, that is the point. I think I might be doing something that would only handicap the proceeding in the State court and perhaps confound the issues there.

Mr. Hartfield: We do not agree with your Honor and we hope you will bear with us, but we do agree on one thing, if we have to go to the Burchill Act, that it cannot be done alone under Chapter X, because we could not under any possibility come in under Chapter X. Your Honor is probably familiar with 1775 Broadway, where the Court held they could not release the claims—

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Mr. Arkush: I want to suggest to your Honor, as you have already made one suggestion to Colonel Hartfield, as a noted draftsman, ~~that you ask him to~~ consider this second suggestion, namely, that there be a limitation on the right of the debtor to declare out dividends on any magic money which may be realized in the future until our certificates are paid off. I think if that is conceded our committee will be glad to approve this plan, and whatever procedure is worked out.

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The Court: Were your questions directed to that?

Mr. Arkush: Yes. The other qualification we have is of a purely legal nature, which the witness would not be qualified to speak on, namely, that in case any reorganization or bankruptcy proceedings as a whole are started against this debtor or initiated by it, as distinguished from a piece by piece reorganization of its various situations, that when our certificates should immediately be matured. That should be put in the acceleration clause in the indenture.

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The Court: How can you do that unless you have the Trinity Buildings Corporation?

Mr. Arkush: That should be agreed to by the Trinity Buildings Corporation.

The Court: You will have to arrange that in the State court proceeding.

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Mr. Arkush: I think there is a great deal of force in what your Honor has said but, after all, that is procedural.

The Court: I think that is what Mr. Arkush was driving at in his questions, and that is why I thought

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we might as well dig into the legal phase of it which, after all, we have to consider, the legal framework. We have had a good deal of testimony on it.

Mr. Marx: Your Honor, I am sure, is going to consider this question on his consideration of the case, but I want to call attention to the fact that the amended plan provides as accepted by a majority in number and amount that no Burchill Act proceeding and no other proceeding is to be instituted on the plan by the mortgagee or by the holders of the certificates until the arrangement of Realty has been confirmed under the Chapter XI proceeding. There is an absolute covenant there not to start a proceeding there until this proceeding is completed.

Mr. Rickaby: I think your Honor got a very clear idea from the frank statement of Mr. Marx. Of course, if they are successful in this plan, it does amount to practically a coercion in the State court. They have another reason they want to go into the State court and that is that they think perhaps the doctrine of the Boyd case, the Day and Meyer case and the Barclay case, which I recited to your Honor, might not be applied in the State court and that there may be a different rule. And they know very well if Trinity Buildings Corporation comes in under Chapter X, it will evolve out of Chapter X with no stock interest in it still owned by this debtor.

The Court: That has not been the case in other reorganizations in 77B, where they have not attempted to change the principal amount of the indebtedness. They have been permitted to provide for different

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times and amounts in connection with the interest and for sinking fund changes and the like, but when it came to changing the principal amount of the bonds—

Mr. Rickaby: Reducing interest—

The Court: No, wait a minute. We have all overlooked something. In 77B you could not deprive a party of his security, you see, and they were changing part of the principal of the debt which was secured by the mortgage into stock.

Mr. Rickaby: And there are decisions, plenty of decisions, your Honor, to the effect that the creditor is entitled to his full principal and his full interest, and in the language of the Day and Meyer case, an equity cannot be carved out of him for the benefit of stockholders.

The Court: No, you could have a nominal stock interest. What difference would it make whether they had seven or eight thousand shares of stock worth \$5,000 or had 500 shares of stock worth \$5,000? Would not make a bit of difference. That stock, and it is entirely owned by the Realty Company, U. S. Realty & Improvement Company, that stock would represent the equity. There would not be any change in that.

Mr. Rickaby: That is just what was in the Barclay case.

The Court: I know; I don't think so.

Mr. Marx: No lien is impaired.

Mr. Rickaby: I claim to have had a little experience in 77B, and if you reduce principal or interest, you

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have to give the creditor something for it. In other words, the stockholder cannot remain unaffected when you reduce the creditors' claim to any extent. He has got to give up something.

The Court: But you have a right to rearrange the interest. Otherwise, what would be the use of 77B?

Mr. Hartfield: He has overlooked completely the fact that U. S. Realty is also a creditor of this company.

Mr. Rickaby: Your Honor is correct.

I have not overlooked 620 Church Street either.

Mr. Marx: U. S. Realty is also contributing \$25,000 to the expense of the Trinity Buildings proceeding.

Mr. Hartfield: May we now close this meeting?

Mr. Brozan: Will your Honor permit me to ask a few questions of this witness?

Cross Examination By Mr. Brozan:

Q. In the pro forma—

The Court: I am permitting you to question this witness because you represent two bondholders, not because you have any standing in the proceeding, but simply because you have made a request.

Q. In the pro forma balance sheet, you have given no value to your investment in Trinity, isn't that so? A. Yes, sir.

Q. And that is because you stated that you believe that interest has no readily realizable value? A. Yes, sir.

Q. But you do not believe that the properties at 111 and 115 Broadway are worth more than \$3,700,000, do you?

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A. Well, I think in the Burchill Act proceeding that will come out. If they are, why, the bondholders will get their money, if somebody is willing to pay it. 853

Q. Will you just please tell me? You have been qualified as an expert as to the value of real estate.

The Court: Answer the question.

Q. (Read). A. I don't think that any more than \$3,710,000 could be realized today.

Q. I ask you again whether or not you believe that these properties are worth more than \$3,700,000 today? Can you answer that yes or no? A. Yes, I believe they are worth more. 854

Q. When you say you believe they are worth more and at the same time say you do not believe that they can realize more, what do you mean? What is the distinction in your mind? A. I do not believe that anybody that has \$3,700,000 would use it to buy the buildings.

The Court: He means you could not sell them for that, counsellor. If you own any real estate, you know that what you think you have is real estate worth a great deal, but you get out and try to sell it.

Mr. Brozan: I am asking this witness as an expert qualified to testify as to values, whether or not these properties are worth more. 855

Q. Let me ask you this question, is there a protest now on record by the company against real estate assessments, tax assessments in the City of New York?

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The Court: Which company?

Mr. Brozan: By Trinity.

A. There is not, no.

The Court: He means as to the assessed valuation.

Mr. Brozan: Yes.

Q. There is not, now? A. No.

Q. What is the last one that was filed for Trinity?

A. That was for the tax year beginning July 1, 1939.

Q. And in the protest which was filed what value I you ascribe to these properties? A. I cannot tell you exactly but it was around \$7,000,000.

Q. And that value of \$7,000,000 represents the value which the board of directors of Trinity fairly believes to be the value of the properties, is that right? A. I don't think so. I believe that that is a value that the board of directors believed the property was worth not in excess of, if that is not a funny way of putting it.

Q. As a matter of fact, they think it is worth less? A. They do think it is worth less.

The Court: They are ready to pay taxes on that value, is that what it means?

The Witness: Yes, sir. I mean, that was the value that we put in there to get our taxes down.

Q. You did not put it in to get your taxes down without believing that it was worth at least that? A. No, I think for any other purpose the directors of the company would state that the property was worth less than that.

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Q. What is the assessed valuation according to the latest issued assessment of both properties? A. \$10,500,000.

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Q. So in the opinion of the board of directors this property was over-assessed by at least \$3,500,000? A. At least that.

Q. If these properties were properly assessed this company would have a net income annually enough to pay its full interest obligation on the bonds, I mean, Trinity would have, would it not?

The Court: What do you mean by properly assessed?

Mr. Holden: I will rephrase my question.

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Q. If these properties were assessed by the tax assessors of the City of New York at a value which the directors, the board of directors of the company believe to be the fair value thereof, the net income of Trinity annually would be sufficient to pay its full interest obligation on the bonds? A. If you mean that if taxes were reduced also by 5½ per cent, I would say yes.

Q. If the taxes were reduced, your expenses would be reduced and your net income would be greater? A. Yes.

The Court: Reduced to what figure?

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Q. Let us take \$7,000,000—

The Court: Yes.

Q. —as the figure, how much would be the saving on your taxes in New York City annually? A. About \$100,000, I would say.

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Arthur J. Flohr—for Debtor—Cross.

862 Q. And for the year 1938 your deficit on operations was \$51,000, is that right? A. Yes, approximately.

Q. So if your assessment had been \$7,000,000 then for 1938 you would have been able to pay the full amount of your interest for the year 1939? A. We would have earned it, yes.

863 Q. Don't you think that, it would be fair for your plan and arrangement to provide that if there is a reduction in taxes to the City of New York there should be an upward change in the interest rate on these bonds? A. Not necessarily. I do not believe there is anything peculiar about reducing the rate of interest on a mortgage when it becomes due. That has been done.

The Court: No, the point is this, if there is a saving, so that the fixed charges against the property are reduced, together with the interest on the mortgage, that the certificate holders should have some benefit of that?

The Witness: It is true they will have a benefit of any reduction in expenses that we might be able to effect up to the amount of the interest that we have agreed to pay.

864 The Court: Beyond that in the plan, or an amendment to the plan, it might be possible to take care of any increase in the net income, no matter what the source.

Mr. Marx: It goes to the sinking fund. It is proposed to retire the bonds as much as possible.

Mr. Brozan: How about restoring the interest they are losing now?

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Mr. Rickaby: The sinking fund merely buys them up.

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The Court: We understand that.

Mr. Brozan: Under this plan they provide that the additional rate of interest for the first five years shall be one per cent, if earned. If they are going to provide for an addition, if earned, why limit it to one per cent?

Mr. Marx: Cumulative.

Mr. Brozan: If they earn more.

Mr. Marx: If it is not earned, it is payable at maturity.

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Mr. Brozan: Why make them wait until then? You may not be in existence then.

The Court: There may be some other way of conserving the assets, and other counsel have made that point, and it would apply to any saving from taxes or anything that would increase the net income of the Trinity Buildings Corporation, the obligor under the bonds, mortgage or under the indenture. Now, something might be done along that line, if we can get around the legal formalities so that the certificate holders would get the benefit of any increase in net earnings of the bulidings. Of course, you do not need to argue that. You do not need to question him about that any further, because it has already been suggested that some amendment that would carry with it a general provision that would encompass a general provision, so that the certificate holders would get the benefit of any increase in the earning capacity of these two build-

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ings, should be made. They are two very fine buildings. They are in a good section of New York. One of them is, as I recall it, right alongside of Trinity Churchyard and has all the light and air there from that large vacant plot of ground. The other one is right above it with that narrow street in between. Well, you know, gentlemen, that real estate these days, if you own any of it, you certainly do know it, you cannot go out and sell it for a certain sum, and you do not get the income from it that gives you any sort of return on your investment. In many cases it carries itself. Around New York you will see them tearing down buildings many stories high and putting up what? Just taxpayers. Against what? Against the day when things may improve so that there will be a demand for space and you can get some return. I agree that a plan that does not accomplish that purpose now should be amended so that that possible increase in the earning capacity of the building during the extended period of the mortgage will inure to the benefit of the certificate-holders and not be available by way of dividends on stock of the Trinity Buildings Corporation, that would go to the present debtor, the United States Realty & Improvement Company as the owner of that stock.

Mr. Marx: Those limitations are all contained.

The Court: We will study that carefully and if there is anything further which should go in to fulfill that purpose, it should go in. You see, they would love to get that building down to an assessed

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valuation of \$7,000,000. I suppose 99 per cent of the owners of real estate would be glad to do it, but what would happen to the City of New York? Can you sell that idea to the Board of Estimate? Where are they going to get the money to pay interest on the city bonds? What would happen to city bonds? What would happen to them if they went around and reduced the assessed valuation on all the buildings 30 per cent? They would not have enough money to balance the City budget. How much is derived from taxes on real estate? Cut it by 30 per cent. Would the City be able to pay its way? It could not.

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I do not think you can look for much relief along those lines. You have to be practical. The City has to live; it has to have taxes. If it does not get the amount it needs why, it is in a bad way. If you figure $2\frac{3}{4}$ per cent on a certain assessed valuation, it will be 5 per cent on a reduced valuation, whatever is within the constitutional limit. I do not know whether there is a constitutional limit on it or not. However, in Westchester, the tax rate is a whole lot higher than it is in New York City. So, we have to be practical about this thing. I hope that there may be some saving in taxes for you but the main hope in this case is that you will get more out of the building. That is your best anchor to windward to keep you from going on the rocks entirely. That will depend upon a general improvement in real estate conditions, I think. This property is well located. Any of us who have been around the City a good many years, who know something about the development of real estate

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Arthur J. Flohr—for Debtor—Cross.

along old Broadway, can recall these buildings. Space was always demanded. Stock brokers and lawyers were the principal tenants, weren't they?

Mr. Marx: Yes, principally stock brokers.

The Court: Let us hope conditions will improve. Stock brokers are reducing space, everyone knows that, and they have a hard time meeting their overhead. They have not been able to make the money that they used to make. There is the real difficulty with the case. That is the cause of your trouble. That is a proper diagnosis. They are not getting the rentals out of this building that they used to. There is your trouble and I suppose that is true for practically every real estate company that holds or owns large buildings downtown, or uptown, for that matter.

Q. About this improvement fund, since January 1st of this year what expenses has the corporation had for improvements which in the future you intend to charge against this improvement fund? How much has that amounted to?

A. I would say none.

Q. And in the year 1938 how much? A. It is hard for me to think of all—I believe the improvement fund is for something entirely different from any expenses that we have had. The improvement fund was originally thought of with the idea of providing a fund that might accumulate to a substantial amount over the years and when the building, which is very old, as buildings go, required, for instance, new elevators, or air conditioning, or some expensive large structural alteration, there would be money with which to do it, so it would remain competitive in the downtown district of New York.

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Arthur J. Flohr—for Debtor—Cross.

Q. Under the plan as now proposed, if you do not have such improvements, isn't it permissible for you to transfer this whole fund to the sinking fund and use it to purchase bonds in the market? A. I would rather have Mr. Marx answer that. I don't know whether it is permissible. I think there is a provision that we could buy—whether we could do it or not—but the plan speaks for itself.

Q. There is nothing in the plan that requires you—

The Court: What do you say about that?

Mr. Marx: "Further, upon the written consent of the corporate trustee, funds at any time on deposit in the improvement fund may be requisitioned by the board of directors of the new company and applied to the sinking fund hereinafter described." In other words, at any time the improvement fund was not necessary, or we had accomplished what we wanted here, why, these funds could be used to retire bonds and go to the benefit of the bondholders instead of just lying fallow.

Q. If the rate of interest is reduced permanently to 3 per cent, ...t the market value of these bonds also permanently reduced so that you will be able to buy them in the open market at approximately what they are selling for today?

A: I could not say that.

The Court: Counsellor, if they were sure of getting 3 per cent and had the two buildings behind the bonds and a good guarantee, I do not know that the value would be reduced. I think, as a matter of fact, if the

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Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

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uncertainty as to whether they would get a certain sum one year and a certain sum another year, or a postponement of interest for a while, were removed, that even with 3 per cent bonds, with two good buildings in back of them and with a guarantee that they say is absolutely good, or will be absolutely good, in fact might serve to stabilize the value of the certificates. That is my view of it and I think that has been the experience in some other cases. What do you folks say?

When you finish the court procedure, you see, and there is something that goes out as a result of it that is stable, then you have a value.

Another thing, a sinking fund for the purchase of these bonds is a good thing because it affords a market so that anyone who wanted to sell a bond, it might be distress selling; would have a place to go and would not have to go to some place else where the price might be very much scaled down on him. As to whether or not this money should be used for the sinking fund or should be just kept or should go in additional interest to the certificate holders, that is something we will determine.

Mr. Brozan: That is the point I was after, your Honor: It seems to me that if they do not use the improvement fund for improvements—

The Court: You think that should go to interest?

Mr. Brozan: Either to interest or retained as an improvement fund, or later go to the certificate holders, if not used for that purpose.

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Mr. Bardusch: I want to offer this in evidence to complete the record.

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I offer into evidence Class B common stock agreement, dated as of January 31, 1936, between U. S. Realty & Improvement and Fuller Building Corporation.

(Marked Earl Committee Exhibit D.)

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Now, if your Honor please, annexed to our papers for leave to intervene, or part of them, were our objections to the plan. They were served a week or so ago. I am now asking leave to file supplemental objections addressed to the fact that all parties are not before the Court, in that the debenture bond issue, so-called and so characterized in this plan, as a secured bond issue, is an unsecured bond issue, and that under the terms of the Bankruptcy Act, Chapter XI, the holders of those debentures are at the most partially secured creditors and are general creditors as to any amount in excess of the amount of their security.

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The Court: Is it your idea then that under Chapter XI a debtor has the right to reorganize any part of his debt except a totally unsecured debt?

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Mr. Bardusch: I think it is restricted; by virtue of their plan it is restricted to their unsecured creditors.

The Court: I am talking about Chapter XI.

Mr. Bardusch. Yes.

The Court: Can they reorganize any debts but unsecured debts under Chapter XI?

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7, 1939.*

Arthur J. Flohr—for Debtor—Cross.

Mr. Bardusch: No, I think it is restricted to unsecured debts.

The Court: Does it depend on the value of the security? Suppose the shoe were on the other foot and they came in and said, "Why, we are going to reorganize this debt that is only 10 per cent secured to the extent of 90 per cent that is unsecured"—could they do it?

Mr. Bardusch: It is a grave question in my mind. That is why I do not think this act applies to this proceeding.

The Court: I mean, on the question of whether these debenture holders that have seven or eight thousand dollars which relate to the Fuller Building Company, whether they are unsecured creditors within the meaning of the Act?

Mr. Bardusch: Yes, because, I believe that secured creditor means something.

The Court: Cover that in your brief and file supplemental objections.

Mr. Bardusch: That is all I ask.

The Court: The Securities & Exchange Commission has been represented here and has sat very silently through the day, following the proceedings.

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Mr. Panuch: Your Honor, so far as we are concerned, we earnestly believe that this case belongs under Chapter X and that it is a jurisdictional error to have it under Chapter XI.

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(Adjourned to July 10, 1939, 12 o'clock noon.)

**Adjourned Meeting of Creditors before Judge
Leibell—July 10, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy No. 74,023.

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[SAME TITLE]

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 10th, 1939 :
12:00 o'clock noon.

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A P P E A R A N C E S :

WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph A. Bennett, Esq., and
Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.,

Attorneys for Ralph W. Earl and
Donald M. Halsted, as members of
Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee
of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and
H. McAfee, Esq., of Counsel.

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July 10, 1939.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Esqrs.,

Attorneys for Guaranty Trust Company
of New York, as Trustee;

J. Howland Auchincloss, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate-
holders.

WATSON, KRISTELLER & SWIFT, Esqrs.,

Attorneys for R.^o Gilbert Jackson;

Frederic W. Dillingham, Esq., of Counsel.

J. A. PANICH, Esq.,

Attorney for Securities & Exchange
Commission, Amicus Curiae;

George Zolotar, Esq., of Counsel.

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*The Court: I have signed the order, the third paragraph of which reads as follows: "It is hereby decreed, therefore, that for the purposes of the arrangement and its acceptance claims have been filed by the holders of 495 in number of such share certificates and by the Beha Committee on behalf of 56 in number of such holders, aggregating \$3,710,500." The fourth paragraph of which is: "Acceptances in writing are hereby determined to have been filed by 304 holders of such sharecertificates aggregating \$1,961,500 principal amount." And the fifth paragraph: "It is hereby determined therefore that the arrangement has been accepted in writing by a majority in number of all creditors affected by the arrangement whose claims have been proved and allowed

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July 10, 1939.*

before the conclusion of the meeting, which number represents a majority in amount of such claims."

And, of course, the stenographer has noted on the record that there were certain additional claims filed here this morning and they were allowed.

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Mr. Rickaby: I would just like to call your Honor's attention to a point that appears from the record. There are other unsecured creditors, that is, these debentures have no security behind them, the so-called security is revokable and can be called away and its value is nominal.

The Court: What do you mean, it is nominal?

Mr. Rickaby: Under the indenture they can be withdrawn from the pledge, but irrespective of that—

The Court: What are they to substitute for it?

Mr. Rickaby: Nothing.

Mr. Bardusch: Since I have raised that, may I say a word, if you please, Mr. Rickaby?

Mr. Rickaby: Yes.

Mr. Bardusch: Your Honor, the other day, when I introduced in evidence the four agreements which I felt covered that situation, I did not discuss here in court the tenor of those agreements. The agreement of pledge provides that the stock of the Fuller Building Company is deposited as collateral security for the two lots of debenture bonds subject to what was called the Class B common stock agreement. That agreement provides in effect that the Fuller Building Company has the right upon the happening of a certain contingency, namely, the amount of its earnings, to withdraw that stock, to get it back from the debtor, and the pledgee has

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*Adjourned Meeting of Creditors before Judge Leibell—
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no rights in there, he must give it up, willy-nilly, and there is nothing to be substituted for it.

898 The Court: I know, but has the Fuller Building Company the right to get it back and pay nothing?

Mr. Bardusch: And pay nothing, and they must surrender it to the Fuller Building Company.

The Court: Have they done it?

Mr. Bardusch: They have not done it up to this moment, but I contend it is a mere contingent pledge.

Mr. Marx: No, it is more.

The Court: It is an actual pledge subject to its defeasance or its elimination by a condition subsequent.

899 Mr. Bardusch: Yes, but there is nothing to be substituted for it.

The Court: But whether it is or not, now, if we are not to consider the value of this surety and merely the fact that it is up under an agreement, then these claims are the only unsecured claims, those of the certificateholders under the guarantee, and that the debenture holders, that this George A. Fuller—

Mr. Bardusch: No, it is not George A. Fuller. Fuller Building Company.

00 The Court: —Fuller Building Company as secured, are not unsecured creditors. Have any of you looked into that point as to whether or not the Court has the right, in determining whether a creditor is secured or not secured, to consider the value of the security?

Mr. Marx: No.

Mr. Bardusch: I maintain this proceeding being in bankruptcy that the provisions of the bankruptcy law, by the very title of this Act, by which it says that the provisions of Sec-

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tions 1 to 6 apply insofar as they are not inconsistent, and I cannot find anything in this Act dealing with an inconsistency. While we have not briefed the point yet, you said you wanted briefs by the end of the week, I feel very seriously about that.

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The Court: All right; I have signed this order now because we have gone ahead on the assumption that the certificate-holders were the only unsecured creditors. If it develops later, as a matter of fact and law, that there are other unsecured creditors, these alleged debentureholders, I, of course, can always enter an order modifying this order.

Mr. Bardusch: Merely for the purpose of the record, may I have an exception?

The Court: You want to make your record, and you have it.

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Mr. Bardusch: And we will submit these documents to your Honor when we submit briefs, and I have an exception.

Mr. Rickaby: That was my sole purpose. I would like to have an exception.

The Court: You just wanted the record to be straight.

If I should find later that these debentureholders are unsecured creditors why, of course, we might have to give consideration to that and reopen the matter.

Mr. Marx: Well, your Honor, if that should happen, then we would have to go into the question of whether or not this is an arbitrary and unjustified classification under Chapter XI.

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The Court: All right. Apparently everybody in seeking representation here looked only to the certificateholders, anyway, and nobody has appeared here for those debentureholders.

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Mr. Bardusch: No.

904 The Court: The Court will take notice of the fact that the testimony shows there are debentureholders.

Mr. Bardusch: The point is it leaves the debentureholders unaffected, thereby cutting down the certificateholders. That creates a preference for the debentureholders.

Mr. Marx: That is specifically provided for in the Act, I think Section 351, which states that the Court may fix the division of creditors into classes.

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905 The Court: You may have this in mind when you write your briefs, that the way this case shapes up is about as follows: First, we have a contention on the part of the Securities & Exchange Commission that this proceeding does not lie under Chapter XI of the new Bankruptcy Act, known as the Chandler Act, but that the complete reorganization of the debtor should have been brought under Chapter X of the Chandler Act. The Securities & Exchange Commission in support of that contention refers to the minutes of the hearings before the committee in charge of preparing this bill and its submission to the Congress for enactment. It would appear from the hearings before the committee in the House that it was the purpose of the members of Congress to have Chapter XI serve particularly the smaller business type of debtor who had unsecured creditors. That type of debtor had been securing relief under former Section 77B, where he really did not belong. Chapter XI afforded him a so-called arrangement with creditors, practically, or a composition—that is what it amounted to.

Although it may have been in the minds of the members of

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the committee of the House that Chapter XI would serve that purpose and its application be limited to that class of debtors, there was nothing put in the Act itself to exclude any debtor, large or small, if he could otherwise qualify under Chapter XI, from seeking relief under that chapter, even though he had secured creditors, if what he sought was to reform in respect to his unsecured debts.

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Another point has been raised, and that was just discussed, as to whether or not the sole unsecured creditors of this debtor are the certificate holders under the mortgage made by the Trinity Buildings Corporation, of which this debtor is the guarantor, or of the holders of the debentures that were issued by this debtor and which are secured under a pledge agreement, the security being certain stock of the Fuller Building Corporation. Are those debenture holders also unsecured creditors? That is a point you will brief.

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Assuming that we decide that, after considering the briefs, the proceeding is properly brought under Chapter XI, and that the only unsecured creditors are these certificate holders, and, of course, I have already found that a majority in amount and number of those certificateholders who filed claims have accepted the modified plan, we then meet the phase of the case where the obligation is placed upon the Court to determine whether or not the plan is fair and equitable and workable.

Taking up the last word first, whether or not it is workable. I think that there we encounter some difficulty, in view of the fact that the plan is one submitted by the debtor as the guarantor of the payments of interest and principal due under the mortgage made by the Trinity Buildings Corporation, which is a lien on the two buildings, 111 and 115 Broad-

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way, Borough of Manhattan, New York City. We have not in this court in any proceeding the mortgagor, Trinity Buildings Corporation and, in fact, the plan submitted by the guarantor contemplates an application in the New York State Supreme Court for a reorganization of that mortgage under the so called Burchill Act. As I read the plan of the debtor in this present proceeding, it is built around the assumption that there will be certain provisions in the plan that the State Supreme Court will finally evolve in the Burchill Act proceeding in respect to this mortgage made by the Trinity Buildings Corporation.

I think we might be doing a futile thing, or something that we would have to revise and do over again, if we were to conclude this proceeding. Mr. Marx, before you concluded a proceeding in the State Supreme Court for the Trinity Buildings Corporation under the Burchill Act. I am afraid, if we were to take a definite stand, and we would have to in evolving all the terms of the plan in this court, if we were to take a certain definite stand in respect to what should go in a plan of reorganization of the mortgage itself under the Burchill Act proceeding, the State Supreme Court might resent that, and all of that, I think, affects the question of the workability of this plan. How can I hold that the plan is workable unless I shut my eyes to the fact that it is a plan, the workability of which is contingent upon what will be done in the State Supreme Court proceeding? That is as I see it now, but you may convince me otherwise in a brief. However, this is just a statement by the Court, with all the evidence in, as to the reaction that it feels with respect to the points that have been raised in this hearing.

On the question of what is fair and equitable, I feel that

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some of the contentions made by these committees as to further provisions for the security of the certificateholders have some real basis. Amendments may be necessary to the plan in order to see to it that if any income is received in any year that would exceed the height of the dam of the interest that is payable, so that there will be something going over the spillway, well, these certificateholders want to be sure that whatever goes over the spillway will be impounded for them in some way or other, so that all the net income of the two buildings will surely go to them and may not be siphoned off by the debtor, in this proceeding, the United States Realty & Improvement Company.

Then the question of this \$50,000 item, whether that is necessary, and if it is not used, for what purpose it may then be applied. Should it go as additional interest? Should it be made part of a sinking fund, as the plan contemplates? Those are other phases of the plan that we might consider on the question of what is fair and equitable.

Of course, we all know that there is hardly any plan that is ever offered in these reorganization proceedings where it is not announced that some way is going to be found of further strengthening that plan for the protection of those who, after all, as the courts have held, really own the property, that is, the certificateholders of the mortgage, and they have the first lien on the property and it is really their property in fact, although technically the title is, in this case, in the Trinity Buildings Corporation.

That is the way the matter shapes up in my mind. I may not have covered all the points. If counsel think there are other points that should also be discussed in the case, I will hear them now.

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16 Mr. Bardusch: I would like to cover in the brief the additional points that were raised in our objections, on which your Honor has not touched. We feel very strongly on this question of the duration of the extension, always keeping in mind that this is not a refinancing. There is no refinancing here. They are just taking time. We do not think that under these conditions, in view of their very testimony the other day, they can see ten years ahead. Why should we be bound ten years under this plan? I think five is enough, and that cannot inconvenience anybody.

17 There is another thing I did not want to bring up. I admit, the informality of these proceedings rather puzzled me, to know when I can say something

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8 It may be addressed to the motion, which I understand will be made to close the hearing, but this thought has occurred to me, that, considering the statements of this plan, the balance sheets annexed to this plan, and the variance between those and the proof adduced by the debtor here the other day, which showed this debtor to be, well, let us say, just on the brink of insolvency, without even considering any liability contingent on this debt, that before the acceptances are finally concluded and accepted here, that an order of this Court should be made directing a further notice to be prepared under the supervision of this Court bringing to the attention of all assenting bondholders what has transpired, and I am referring particularly to the effect of their financial—

The Court: Why don't you leave something to the Court? After all, I am going to consider the evidence.

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Mr. Bardusch: I was going to make a motion that a notice should go out.

The Court: No. I do not think it is necessary at all. We would never get through with notices.

Mr. Bardusch: There is that possibility—

The Court: Every time a new acceptance came in we would have to send out a new notice to all the certificate-holders as one grand jury to consider it. No, you may make to the Court any observations based on the proof, and I will act for the certificateholders. Don't worry about that.

Mr. Bardusch: That is one of the points. I will make it and put it in the brief.

The Court: Mr. Rickaby?

Mr. Rickaby: I have nothing further to say.

Mr. Arkush: I just want to bring out this point; It seems to me, for purely technical reasons, the meeting ought to be kept open. There may be something that should be done at the meeting. I have in mind specifically the suggestion I made as to the election of a committee, which might be considered useful at some later date, and I merely suggest, as a matter of convenience, that the meeting be kept open.

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The Court: I think our greatest difficulty will be in determining the time when the decision should be made, whether or not this matter should be decided before you go on with your State court proceeding under the Burchill Act. I always like to put myself in the other man's place, and if I were sitting over there, of course, and something like that came from here, I might just say, "Well, what are they trying to do, hobble me? Fix my gait?" We have to be a little bit practical about these things. And then too there is, of course, the possibility, even though a Judge might receive it with

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the best grace and not be offended by such course, he might think, "Well, I think from what I have here now, we should have this amount of interest fixed, and we should have this as reserve, and we should have this for the sinking fund, and something else, and the mortgage should be extended, not ten years, but five years or seven years." It might be the safer course would be to keep this matter before the Court, keep it open, with the understanding that the Court would cooperate with the State Supreme Court. Give that a lot of thought.

(First Meeting of Creditors concluded.)

(Oral Argument of Counsel to be held on July 17, 1939, 2.00 p.m., Room 506.)

Hearing before Judge Leibell—July 20, 1939.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****Bankruptcy No. 74,023.****925**

[SAME TITLE]

Before :**HON. VINCENT L. LEIBELL,***District Judge.***New York, July 20, 1939, 2.00 p.m.****(Hearing set for July 17th, 1939, further adjourned to this date.)****926****A P P E A R A N C E S :****WHITE & CASE, Esqrs.,****Attorneys for the Debtor;****Joseph M. Hartfield, Esq.,****Joseph A. Bennett, Esq., and****Henry M. Marx, Esq., of Counsel.****WILLIAM E. BARDUSCH, Esq., and****HAROLD A. SCHEMINGER, Esq.,****Attorneys for Ralph W. Earl and****Donald M. Halsted, as members of****Bondholders Protective Committee.****927****SIMPSON, THACHER & BARTLETT, Esqrs.,****Attorneys for Bondholders Committee****of which James A. Beha is chairman;****Hamilton C. Rickaby, Esq., and****H. McAfee, Esq., of Counsel.**

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RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate Holders.

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J. A. PANUCH, Esq.,

Attorney for Securities & Exchange Commission. Amicus Curiae;

George Zolotar, Esq., of Counsel.

The Court: Let us agree on the order in which I will hear the argument.

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Mr. Hartfield: I should think the first thing to be disposed of would be a motion made since our last hearing, a motion made by the Securities & Exchange Commission for leave to intervene, and another motion made by them for an order to dismiss the petition and to deny confirmation of the arrangement, and we would like to be heard briefly, your Honor, at the proper time in opposition to the application for leave to intervene.

The Court: I will hear the applicant first. I signed an order to show cause bringing on this motion.

Mr. Hartfield: Yes, sir, and we desire to file an answer to the motion for leave to intervene and an answer to the motion to dismiss the proceedings.

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Mr. Panuch: At the outset we are ready to concede that there is no statutory authority under Chapter XI for intervention, nor do we rely upon any such authority.

The situation here which prompts us to intervene is simply this, we believe, and this is probably a part of our main argument for dismissal of these proceedings, that this petition is improperly filed under Chapter XI; that Congress

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enacted two separate and mutually exclusive procedures for corporate rehabilitation, one for the small fry corporations wherein there is no public interest, and Chapter XI, which constituted simply a rewrite of the old Section 74 and Section 12, the old composition procedure; that they very carefully set up certain machinery under Chapter X to apply to reorganizations wherein there was a public interest, to corporations which had securities outstanding in the hands of the public. You remember—

The Court: You would be a proper party to that proceeding, would you not?

Mr. Panuch: Yes, we would be; this being a case where there are more than three million dollars of liabilities, there would be a mandatory reference of the plan to us for report. The fact that this proceeding is, which in our judgment is a jurisdictional error, brought under Chapter XI on an improper theory, to put it charitably, deprives us of the duty which we would have under Chapter X, and that is to report, and the right to intervene and participate in the proceedings in the public interest.

The Court: The point is, then, is there discretion in the court to permit intervention.

Mr. Panuch: That is it, whether there is discretion in the court under its inherent power to permit us to intervene in the public interest and, in that connection, I would like to call your attention to the case of—

The Court: The intervenor must have some interest.

Mr. Panuch: Yes, sir.

The Court: Is the public interest of a public group of officials sufficient or does that mean a financial interest?

Mr. Panuch: I submit to your Honor the case of New

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34 York v. New Jersey, 256 U. S. 296, where they permitted the Attorney General of the United States to intervene in a cause of action involving a controversy over the disposal of sewage between the two States, New York and New Jersey. That is quite obviously of public interest. Also, under Rule 24 of the Rules of Civil Procedure, United States District Courts, Subdivision A-2: "When the representation of the"—

The Court: Wait, until I find that. You mean the general rules for this court?

35 Mr. Panuch: Yes, sir, the Rules of Civil Procedure of the District Courts of the United States. Rule 24, dealing with intervention generally; it says there, your Honor, you will note, "Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Quite obviously we have an interest in this respect, in that we would certainly be bound by the decree here and that we could not avoid the adverse effect of an adverse precedent in a matter of great importance so far as public interest is concerned.

36 The Court: As I recall it, referring to 81-A, subdivision 1, there was an order of the United States Supreme Court making these Federal Rules of Civil Procedure applicable to proceedings in bankruptcy.

Mr. Rickaby: That is correct, your Honor.

The Court: So we have the right to consider that.

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Mr. Panuch: Yes, sir.

The Court: And recently they also made a similar rule in reference to proceedings under the Copyright Act, effective September 1st.

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You may proceed.

Mr. Panuch: That, briefly, Your Honor, is our position upon the right of the Commission to intervene in this proceeding. Of course the motion to dismiss simply is a logical consequence of a position we would take dependent upon the exercise of your discretion as to the permission to intervene here.

The motion to dismiss raises the questions against confirmation and, I believe that from the standpoint of orderly procedure probably Col. Hartfield should argue in support of the confirmation and then we would raise those things in proper order, if that is agreeable to Your Honor, because otherwise I would have to go into my main argument.

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The Court: As I see it, the point is whether the fact is that the Securities & Exchange Commission would be a necessary party in a proceeding under Chapter X if this case had been instituted under Chapter X, and we now have a proceeding under Chapter XI, which they claim should have been instituted under Chapter X. Does that give them such interest in the proceeding under Chapter XI that they should be permitted to intervene? You can see where they are affected by this proceeding. If the proceeding is not properly brought under this chapter, then it would have to be instituted under Chapter X. However, in Chapter X they would be a necessary party.

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Now, Colonel, tell us why they haven't an interest therefore.

940 Mr. Hartfield: Your Honor understands this is a bankruptcy proceeding, which is a statutory proceeding. You also understand that the Securities & Exchange Commission is a statutory body and its rights must be found in the statute, and the jurisdiction of this court, in a bankruptcy action, is found in the Bankruptcy Act. I do not think that the attorney for the other side disputes the proposition that the general rule is that a person not a party to a suit cannot be heard in it and attempt to defend against except on the ground he is a party who has an interest in the results of the litigation of a direct and immediate character.

941 It seems to me the test you have to make here is, has the Securities and Exchange Commission an interest of a direct and immediate character in this Chapter XI proceeding? Because until this court determines that this is not a proper case under Chapter XI, the only thing before you is this Chapter XI proceeding. It seems to me that his admission absolutely determines this motion. He admits that under the provisions of Chapter XI there is no statutory authority for the Securities & Exchange Commission to appear in this proceeding. He admits even that certainly there are no broad equitable powers of this court, if it is a proper Chapter XI proceeding; that you could not under any general equity or broad powers admit the Securities & Exchange Commission.

942 The Court: But as a friend of the court?

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Mr. Hartfield: You might have him as a friend of the court, but that is not what he is asking for. He is asking for leave to intervene and to be made a party to this proceeding, and we deny either that he has authority to ask for such right or that this court has jurisdiction.

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Your Honor will recall that we did not object at the previous hearing to your hearing from him, to your taking a memorandum from him, on the question of whether or not this was a proper proceeding under Chapter XI, and we do not now, but what he is asking Your Honor to do is to determine that, not because Congress wrote it in under Chapter XI, but because he claims this is not a proper proceeding under Chapter XI, and in advance of your determination that it is not a proper proceeding under Chapter XI, you shall make him a party in here, not as a friend of the court, not as a party here by courtesy of the court, not hearing anything he had to say because he represents an important branch of statutory government, but because he is asking you to enter a decree, an order, determining that he is a proper party and that he has a direct interest in this Chapter XI proceeding.

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He admits at the very outset that there is no statute that gives that authority and his only claim to any such interest is that because if this was a Chapter X proceeding, he would have a right and therefore Your Honor ought to, under some exercise of some general equitable rights, say that Congress intended to write in the statute, although it did not, that if the Securities & Exchange Commission comes

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into a Chapter XI proceeding and claims it ought to have been a Chapter X, this court has jurisdiction to make them a party.

The Court: Just a minute. If the court were to find the proceeding should have been brought under Chapter X—

Mr. Hartfield: You will dismiss this proceeding.

The Court: Then it will be proper for me to permit him to intervene.

Mr. Hartfield: No.

The Court: It would not be necessary.

Mr. Hartfield: No, you will dismiss the proceeding.

The Court: But while that is an issue in the case, hasn't he an interest?

Mr. Hartfield: Absolutely not, because he can only have an interest if it is given to him by statute, and he admits there isn't any statute giving it to him.

The Federal Trade Commission made a somewhat similar observation, wherein Judge Sutherland said that it is a necessary implication of the grant of power that if broader powers be desirable, they must be conferred by Congress; they cannot be created by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions.

The Court: Was that an application for leave to intervene in a proceeding?

Mr. Hartfield: That was a case where there was a complaint by the Federal Trade Commission, charging unfair method of competition, and the court held that the Federal Trade Commission was without jurisdiction to make a cease and desist order in

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the absence of a finding, you know, one of the findings of the statute. It was not an application for leave to intervene, but there is another case, your Honor, where the Interstate Commerce Commission was held not to have jurisdiction, where they claimed in certain other cases they would have had jurisdiction, you know, if they had been under—

The Court: This is not a case claiming jurisdiction. They are making a claim for the right to intervene, that is, to be heard as a party.

Mr. Hartfield: Yes, to be made a party.

The Court: Not as a friend of the court, and, of course, they would have certain advantages in that; they would have a right of appeal.

Mr. Hartfield: Even under Chapter X they do not have a right of appeal.

The Court: Oh, yes, they would have a right of appeal here.

Mr. Hartfield: No, even if it were under Chapter X.

The Court: Anybody who is granted leave to intervene has the right to appeal.

Mr. Hartfield: But the Securities & Exchange Commission by the very words of the statute is limited. So it does not have that right under Chapter X.

The Court: If they are granted leave under Section 24, they will have.

Mr. Hartfield: If the court can find any authority for saying "I am letting them in, not under the statute, but on some general grounds," I suppose they would have a right to appeal too under Chapter X. Where it was purely statutory they certainly would

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have no right to appeal. I will stake my professional reputation on the meaning of that statute.

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Mr. Panuch: Your Honor, you have heard a good deal about the elements of fairness, the equitable character of the plan, feasibility. We argue that to some extent except that we have a shift in emphasis. In other words, our primary concern here is not with the fairness of this plan or whether it is equitable or feasible. If it were properly under the statute we would not be here.

We say that the plan here is manifestly inequitable, not feasible and not fair because the machinery provided by Congress for corporate reorganizations involving publicly held securities has been evaded. This debtor is here on a technical construction of the statute on the theory that it is seeking an arrangement of its obligations. Realistically viewed, you have a reorganization of two elements of the same enterprise, Trinity Buildings and Realty.

The question comes down to one of Congressional intent. I think the cases are clear that a matter of this character, even though it comes within the literal meaning of the statute, if it is not within the intent of Congress, it is within the power of the court to decline jurisdiction. In that respect I call your attention to the Church of the Holy Trinity case, which you have read, and also to the American Security case, where Mr. Justice Holmes says, and this is right in line with our argument, "If, then, the words have the meaning given them by the applicants

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the jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result."

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To get back to the legislative history, I think it is quite clear that Chapter XI is nothing but a rewrite of the old composition procedure and we know what the composition procedure is. I do not want to stress that today. I want to direct attention to what Congress had in mind with respect to reorganizations of corporations having publicly held securities. As you will remember, the old abuses under the 77B proceeding were really three: the court did not have adequate control over the reorganization process. That was number one. Two, the security holders had very limited participation in the proceeding. In other words, they had the right to be heard on two specific things and that was all. After that they had to appeal to the court's discretion through a committee and then the committee that got in foreclosed the others, and you had a situation where the committee that got in first got representation and got money and there was no representation for anybody else. The third and the most important abuse of the old 77B proceeding was this: the courts had the duty of finding that a plan of reorganization was fair, equitable and feasible; they had the duty all right but they had no machinery whereby an informed finding of that character could be made.

In enacting Chapter X, Congress on the basis of a four-year study, after committee investigation, de-

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vised Chapter X and that addressed itself to these deficiencies of 77B. First of all, they struck at the abuse of the management sponsoring a reorganization. They provided in each case with over \$250,000 in debts, and this is important machinery, there should be an independent trustee, with certain qualifications of disinterestedness set out in the act.

The Court: Under the old section, 77B, we generally provided for some supervision of that kind by having an accountant in there countersigning checks, and some committee of merchandise creditors supervising the purchase of new materials. It was difficult, there is no question about that, but that was more a matter of management of the business.

Mr. Panuch: That is right.

The Court: If you wanted to be sure the business was properly and honestly managed, and the assets conserved, you would take those various means, not mentioned in the section at all, and adopt them in order to protect the court while the reorganization was going on. As far as committees are concerned, what we did was this, as soon as any committee could show it represented a substantial interest, even though there may have been another committee in first that had been permitted to intervene, the general practice was to permit both committees to come in.

Mr. Panuch: That may be so, and I have practiced reorganization around here a very long time, and my experience has been that once a committee got in, it was awfully hard for anybody else to get in because then you simply made that argument of duplicating work and duplicating fees.

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The Court: If it was a question of simply somebody connected with a law firm, or a client had some bonds and organized a committee and the lawyers came in to represent it, why naturally that was brushed aside. They would be heard but they would not be permitted to intervene. We heard everybody. Single bondholders came in and they were heard. But, at any rate, under Chapter X they did assume to properly supervise—

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Mr. Panuch: You mean under 77B?

The Court: No, under new Chapter X, they attempted to control the organization of these committees, to be sure they would be fully representative of certificate holders, bondholders or whomever they attempted to represent.

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Mr. Panuch: Getting back to the independent trustee and the mechanics of finding out what made the corporation tick and what made it fall, the independent trustee has very broad powers and very broad duties. He makes a thoroughgoing investigation of the condition of the management of the business and of the feasibility and desirability of reorganization. You get an unbiased opinion, and an investigation by somebody in whom the court has confidence, and a competent person who can get right to the guts of the failure of the debtor and come out with the answer. To get to the point, as you pointed out in the old story, stockholders, indenture trustees and creditors had a right to be heard but that was a very limited right. Now everybody, stockholders, indenture trustees, certificate holders, have a right to be heard and to be heard through committees. That makes the participation through committees of certificate holders

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of the very broadest character. The trustee has to file a report and he has to file that report so that creditors and stockholders will know the whole story, and I think one classic example of that is the report which has been distributed to stockholders by Mr. Wardall, in the McKesson & Robbins matter, one of the best I have seen in a complex reorganization.

The committees, as you point out, under Chapter X are controlled by the provisions of Sections 210 and 211. So you have that protection. In cases where liabilities are over three million dollars, it becomes a question of a mandatory reference to the Securities and Exchange Commission for report on the merits of the plan or plans that may be filed prior to that principal hearing on the plan, and the security holders can propose amendments or counter proposals.

If the judge thinks this plan or the other plan worthy of consideration, he sends it to the S. E. C. and we consider two things, fairness and feasibility, and we report on that. Then on the basis of all these proceedings the trustee reports on figures and recommendations as to whether plenary suits should be brought against the manager for past acts of waste or past acts of incompetence or past losses. Then when you get to that point and you make your finding that a plan is fair, equitable and feasible, you have something developed with the assistance of somebody who is absolutely disinterested and with the cooperation of an agency which has no axe to grind and working for the public interest. That is the machinery set up to enable the court to make a finding on a plan as to fairness, feasibility and equitableness, and up

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to that point nobody is permitted, except in most unusual circumstances, to solicit any assents to the plan or to attempt to have stockholders or the security holders or anybody commit themselves in any way for one plan or the other. You have no such machinery that under Chapter XI. That was clearly evident at the very last hearing, day before last, when these committees here tried to intervene, just a question of a few creditors making a deal for approval. This court as a routine matter makes a finding that the plan is fair and feasible—

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The Court: That is why I studied it. Not as a routine matter:

Mr. Panuch: I mean nothing invidious by that.

The Court: I just wanted to set you straight on that.

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Mr. Panuch: Necessarily you do not have the machinery, because obviously it is a matter of agreement which is submitted to you and you make your findings but you do not have the machinery which is set up under Chapter X.

The Court: Don't I have the testimony that we had at the last hearing? Didn't we have the testimony of one of the officers of the corporation?

Mr. Panuch: He testified as to a balance sheet.

The Court: With the right of cross-examination, at least two of the committees did cross-examine, and I think counsel representing some bondholders, I permitted him to ask some questions. You may be right in saying there may be more and better machinery available in Chapter X, but that does not mean that a judge hearing a proceeding

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under Chapter XI acts blindly or gropes in the dark or guesses what the answer should be. He seeks all the light he can get and he gets it in the sworn testimony under the procedure outlined in Chapter XI. That is the reason why, in this proceeding too I permitted the three committees, all of which represent substantial interests, to intervene, but I permitted you to come in here as a friend of the court. The point in which I am interested is, you argue that this is a case of first impression that the court should rule on the question of whether this proceeding should be instituted under Chapter X instead of Chapter XI.

Mr. Panuch: Correct.

The Court: Not so much because of the fact that they do not technically come under Chapter XI, if you give the words that ordinary meaning, but because of the Congressional intent.

Mr. Panuch: Precisely.

The Court: In the case of some minister who had been called to serve in the pulpit in the United States from one of the countries abroad there was a very strained effort to apply the statute, there is no doubt about that. That, I think, is your main point. On the feasibility of course that I do not dispose of until I dispose of this other point, whether we retain jurisdiction.

Mr. Panuch: That is it. And when it comes to the question of feasibility, we urge or we present to the Court some of the points which counsel have made—

The Court: Some of the points which counsel have made, you may have made them first the other day.

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but they have them in their briefs, too, as to the provisions of the plan itself.

Mr. Panuch: Yes, sir.

The Court: But your principal argument is, you think this court should not assume jurisdiction in this matter because it was not the intent of Congress that Chapter XI should apply to a case of this kind.

Mr. Panuch: Because this is a case of a corporation with publicly held securities.

The Court: Can't you imagine a corporation say of fair size—after all, what is large and what is small is a matter of comparison. They are terms of comparison, aren't they?

Mr. Panuch: That is right.

The Court: It depends by what standard you measure them. If you take them by the size of General Motors Corporation as meaning a large corporation, then this is a very small corporation. Taking the size of some corporation that owns a piece, or two or three pieces of real estate as a large corporation, why then this would be classified as a large corporation, but couldn't you imagine, couldn't you properly suppose, because we are an average size corporation, finding that as to its secured debt it was all right, did not need to reorganize that, the obligations were not yet due, we will say, the company was in shape to meet them, the fixed carrying charges could be met, but this corporation got itself into a condition where it had to go to the bank, we will say, and was fortunate enough to persuade the bank to lend some money without security, after using all the persuasive powers at hand, and they probably

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would be great, if they could get money without security, and then the bank said, "Now we want to be paid." Now, is it your idea that the corporation, in order to reorganize its unsecured debt, would be obliged to go into Chapter X? Would that be necessary because it had other securities, we will say, outstanding obligations, some of them held by the public, yes, many of them, yes we will assume all of them held by the public?

Mr. Panuch: What you describe there is an overgrown composition. They are in trouble with a few creditors and they go to the bank. We are not talking about that.

The Court: No, no. Say they have a number of merchandise creditors, is it your idea that Chapter XI would not apply to a situation where the debtor has securities which are publicly held?

Mr. Panuch: Judge, we claim this—

The Court: No, no. I am just wondering what your reaction would be. What would that corporation have to do? Would it have to have an involuntary bankruptcy? Would there be no form of reorganization available to it unless it were a complete reorganization, taking care of something that did not need to be reorganized, secured debts that were all right, just because it was in a position where its unsecured debts did require reorganization?

Mr. Panuch: Well, if they were publicly held securities, I think what you mean by reorganization of an unsecured debt means that some unsecured creditors are going to be shaken down and the stock is going to stay in as is. That is fairness.

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The Court: That is fairness.

Mr. Panuch: Yes.

The Court: There is something different between jurisdictional argument and an argument, if you have jurisdiction and you pass on the fairness of it. That will be carefully examined.

Mr. Panuch: May I ask you to clarify your question in my mind?

The Court: Yes.

Mr. Panuch: Are these securities you are talking about, that you are going to reorganize, in your case, are they publicly held securities?

The Court: Yes.

Mr. Panuch: Then absolutely, yes.

The Court: We take it first in the case where they are not publicly held. We will say a man has a score of merchandise creditors and, say, three or four banks.

Mr. Panuch: That is Mr. Hartfield's case, Chapter XI.

The Court: Let us suppose, instead of that, that they had sold debentures unsecured to the public and they had half a million of those outstanding and they fall due and they are not in position to pay the full amount, their secured indebtedness is all right, is not pressing, would they have to take the complete plunge?

Mr. Panuch: Yes.

The Court: Pass under Chapter X? Or could they reorganize under Chapter XI?

Mr. Panuch: Chapter X.

The Court: Why X and not XI? Just because the secured obligation was publicly held?

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Mr. Panuch: Yes, sir.

The Court: Where is that in there?

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Mr. Panuch: That is the argument I meant, that there is this entirely different machinery for the two different types of reorganizations, with the two separate forms of machinery, that Congress so laboriously spelled out. They must have some meaning and they do not have meaning unless Chapter X applies to publicly held securities corporations.

The Court: Isn't the difference between Chapters X and XI really this, that under Chapter XI you may reorganize unsecured debts and you cannot reorganize secured debts?

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Mr. Panuch: Your Honor, it is not as simple as that.

The Court: I may be a little bit dense, but I was just wondering whether the wording of Chapters X and XI would not so indicate, that there is no provision in Chapter XI for reorganizing secured debts, only unsecured, but there is a provision for reorganizing both secured and unsecured debts in Chapter X. Is that the distinction between the two chapters?

Mr. Panuch: That is one of the distinctions.

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The Court: Now show me that in the chapters, that I may see it, because it is in the Act and you can spell it out from the wording of the Act. Now show me the other distinction, namely, that under Chapter XI there is attached to the term "unsecured debts" the further qualifying phrase or clause "unsecured debts" we will say "unsecured obligations," not publicly held.

Mr. Panuch: That I cannot show you. I am arguing the intent of the statute from the framework of the statute.

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The Court: Is that the point in your opinion, or the point of your argument, that you claim that the intent of Congress is that Chapter XI should not apply to unsecured debts where those obligations of the debtor were publicly held? 985

Mr. Panuch: Well, that is part of it. We go much further than that.

The Court: If you can back that up with the citations from the Congressional reports, or something to show that why I want to give it thorough consideration.

Mr. Panuch: We say, your Honor, that Chapter X set up the machinery, it is a matter of legislative history, for the reorganization of corporations of large magnitude, big league corporations.

The Court: I agree that is where most of them would go, especially where they wanted to reorganize secured obligations, but, I say, are they barred from coming in under Chapter XI where all they wish to reorganize is their unsecured obligations? That is the nub of the argument, as I see it. That is the whole case. 986

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Mr. Panuch: Does your Honor have the House report to which we make reference continuously in our brief? I would like to give it to you.

The Court: If I haven't it, I can get it, or if you have an extra copy, you may send it to me.

Mr. Panuch: I will send it to you. That covers public investor interests. 987

The Court: This bill originated in the House. Congressman Chandler gave his name to it. He was one of the most active men in this legislation and his name would quite naturally attach to it. The report of the House Committee

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was the main report. What about the Senate? Was there an additional report there, that covered other points than covered in the House report?

Mr. Scheminger: Yes, I believe two.

The Court: What is in the Senate report on this subject we have been discussing?

Mr. Zolotar: All through the reports, your Honor, there are references to the fact that such and such a provision was designed to protect the investor interest in a corporation. The term has a definite meaning in all the actions in which the Securities and Exchange Commission has participated. It means securities publicly held by public investors. I have not had an opportunity to go through all of it, to give you all the provisions, but in the Senate report it says, in cases where the fixed indebtedness of a corporation is less than \$250,000 no substantial investor interest is usually present, and in such case the court may appoint a disinterested trustee, but it says in other cases, where there is a substantial investor interest, the court shall appoint a disinterested trustee. Examples of that kind appear throughout the report, and if your Honor would care to have them, we shall mark them out.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Bankruptcy No. 74,023.

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 [SAME TITLE]

Before:

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 27, 1939, 12 noon.

APPEARANCES:

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WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.,

Attorneys for Ralph W. Earl and

Donald M. Halsted, as members

of Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee

of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

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I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a creditor;
Aaron Holman, Esq., of Counsel.

J. A. PANUCH, Esq.,

Attorney for Securities and Exchange
Commission, Amicus Curiae.

George Zolotar, Esq., and
Marland Gale, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate-
holders.

McLANAHAN, MERRIT & INGRAHAM, Esqrs.,

Attorneys for a group of bondholders;
Scott McLanahan, Esq. and
Robert T. Crane, Esq., of Counsel.

* * * * *

Mr. McLanahan: I am appearing in this hearing for the first time.

The Court: For whom?

Mr. McLanahan: For a group of bondholders who have heretofore not been represented.

The Court: Who are they?

Mr. McLanahan: I have a list of them here. They hold a million and a half to two million of the bonds.

The Court: Have they already signed or consented?

Mr. McLanahan: They have assented to the plan. This group representing a majority of the bonds had negotiations with the debtor, the owner company and the Realty Company, and the trustee, this spring, and they worked out this

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plan with several modifications later agreed to, and finally all of them agreed that it was the best plan from their standpoint and they were satisfied with it and they went their various ways and filed their assents. They thought it was not necessary for them to be represented in this proceeding. Of course there I think they were very much mistaken. But it is a fact that these large institutions who hold bonds in the amounts of \$25,000 on up to \$400,000, feel that this plan is fair, equitable and feasible. They are anxious to have the plan consummated. Unfortunately, as I say, they did not retain counsel to represent them until yesterday. We understood that a meeting was to be held yesterday afternoon and participated in to the extent of listening to the various suggestions. No agreement or understanding was reached. There are conflicting views and opinions and proposals, and it is important for our clients, the large holders, that they now have a voice in the matter, and I have inquired and find that apparently no possible harm or loss can result from some further delay to give us an opportunity of continuing these discussions to compose the differences and possibly agree on a plan.

The debtor, I understand, is willing to make further concessions. How far has not yet been definitely determined as I understand it. Naturally we are anxious to get all the concessions we can—all the additional advantages we can, but it is the definite position of these large holders that they do not want to have to be compelled to take over this realty and operate it themselves. Therefore they are anxious to preserve the guarantee. I believe that some of the others feel the same way. I am informed that one or two would be willing—

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The Court: Who? Let them stand up and speak now.

Mr. Arkush: What is the question? I don't think it was quite clear.

The Court: I thought you were following the argument.

Mr. Arkush: Are you calling for the lawyers of the committees to stand up who want to take over the property?

The Court: No, those who are against taking over the property.

Mr. Arkush: The Peter Grimm committee is against taking over the property and we are in favor of the plan, although as Mr. McLanahan said, we also would like to get further concessions if they are offered.

The Court: What about you?

Mr. Scheminger: The position of the Earl Committee is this: they do not object to taking over the building but they have suggested and ask for certain modifications of the plan in preference to taking over the building. We are not taking the position that we do not want to take the building, but there are things that we would prefer to do before we take it over.

The Court: What does your committee say?

Mr. Rickaby: We are practically ready to take the building. We feel that there must be something new put into this picture by this debtor before they can be relieved of their obligation. We believe the law is clear. I have and we are perfectly willing to stand on the legal position. We don't say that we won't be glad to sit in to see if anything further can be done.

The Court: Go ahead, Mr. McLanahan.

Mr. McLanahan: What I would like to ask for, if your Honor please, is that this hearing be put over to give us ample time, in fact until after Labor Day. I understand

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the assets are being taken care of and are being segregated; that accounts are being rendered to the trustee every week, and that no possible harm can result by a few weeks' further delay. I believe except for the last position which was expressed that the other creditors have pretty much the same point of view and possibly we can get together on an adjustment of the difficulties.

The Court: But the point in the case that I see that makes the plan not feasible is that you are attempting to reorganize here the guarantee before you start a proceeding in the State court to reorganize the mortgage indebtedness under the Burchill Act. I don't think that either of those two proceedings in two separate courts can be driven as a tandem. You can drive them as a team, they can both go together but I don't think one should be ahead of the other. I think that is a basic fault in the plan.

Now, of course, there are other provisions in the plan as I indicated yesterday when some of the attorneys came up to chambers in connection with a motion that had been referred to me in this matter, that are subject to criticism. I think that many of the criticisms of the creditors concerning other features of the plan are well founded. But as the matter shapes itself in my mind I think that these creditors, these certificate holders who are asked to reorganize the guaranty are entitled to know what is going to be done with the principal indebtedness of the mortgagor before they are called upon to assent to any plan for reorganization of the guaranty. I think that is what is basically wrong with the plan. I feel that we might be doing something that would be misconstrued in the State courts as an attempt to foreclose their own independent judgment in the matter. I feel also that if we were to reorganize the guaranty here on certain

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terms that the State court might reorganize the principal indebtedness of the mortgagor on different terms and we would not have here a plan that would be consistent with and therefore feasible and workable with the other plan.

That is what I think is wrong. I don't think any patch-work amendments to the present plan are going to change that. It can't. I think you have to start all over again. That is my opinion, that there should be a new plan that would be considered concurrently by the two courts, a plan for the reorganization of the mortgage under the Burchill Act and a plan for the reorganization of the guaranty under Chapter XI.

Counsel, you don't mind if I interrupt you to stress these views?

Mr. McLanahan: Not at all.

The Court: Because my views are always subject to correction if anyone shows me I am wrong. Suppose you take your seat a minute and I will get on the record now what has finally crystallized as my view of the whole situation.

I think that the motion of the Securities and Exchange Commission for leave to intervene for the limited purpose of asserting that this proceeding should be brought under Chapter X instead of Chapter XI should be granted under Rule 24 of the Federal Rules of Civil Procedure. That is sufficient interest to permit the granting of their motion.

I have considered the motion that they have made for a dismissal of the proceeding principally on the ground that in the opinion of the Securities and Exchange Commission this proceeding should have been instituted under Chapter X instead of Chapter XI, and I have heard the arguments that they have presented. I have consulted the various parts of the reports of the Congressional Committee which considered

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the Chandler Act and this particular feature of the Chandler Act, which is included in the McAdoo report of 1936, and I have come to the conclusion that this particular proceeding may be instituted under Chapter XI of the Chandler Act.

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Now I will hear you.

Mr. Zolotar: This motion that we made for dismissal was a formal motion simply stating our grounds.

The Court: Wasn't that your sole ground, counsel? That was your main ground.

Mr. Zolotar: I am talking about the formal paper we handed up and which was returnable on July 20th. That particular motion was not verified because we didn't think it was necessary to verify it. It contained no facts.

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The Court: It may be, counsellor, that you could not make it until you were first permitted to intervene. But I considered the arguments presented, the arguments in your brief.

Mr. Zolotar: I am not appearing to talk about the arguments as to the merits of the application. I simply wish to point out that the answer of the debtor raised the objection that that particular motion was not verified. We thought that to make the record completely correct we might submit now an amended motion which would contain a verification. And I simply wanted to introduce that.

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The Court: You mean to meet that technical objection.

Mr. Zolotar: That is right.

The Court: You may present the verification.

Mr. Marx: Is that the same motion?

Mr. Zolotar: Exactly the same.

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Mr. Marx: In other words, we need file no further answer.

The Court: No. The answer heretofore filed shall be considered as filed in respect to this motion. Why do you press that?

Mr. Marx: I don't press it.

The Court: Do you withdraw it?

Mr. Marx: Yes.

The Court: Then we don't need this.

Mr. Zolotar: Thank you, your Honor.

The Court: Now I am of the opinion that in these Chapter XI proceedings, whether or not they are proceedings involving small corporations or large corporations, the size of the corporation is of no moment. If Congress had intended that these proceedings should be limited to small corporations so-called, I think Congress would have fixed some definite limitation in the Act for the guidance of the court and the litigants. However, so that there may be no question about this particular point and the effect of this decision on other cases that may be presented, I feel that for that reason also the Securities and Exchange Commission should be permitted to intervene for this limited purpose so that if it is not satisfied with the court's decision in relation to it, it may take an appeal and be heard in an appellate court. But the motion of the Securities and Exchange Commission to dismiss this proceeding on the ground it is not properly brought under Chapter XI in that according to the contention of the S. E. C., Chapter XI was not intended to cover a case of this kind, that motion is denied.

In respect to the plan itself, I find that this court has jurisdiction under Chapter XI. There are many provisions of the plan that I think should be amended in the interest of the certificate holders, but what those amendments should be I

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don't think we should determine now, because I hold that the plan is not a feasible plan in view of the fact that it is not brought on concurrently with a similar plan for the reorganization of the principal mortgage debt.

I don't think that much could be accomplished by just an amendment of the plan. I have before me the provisions of the statute in respect to the course the court must follow if it finds that the plan is not feasible and denies confirmation, as I intend to do in respect to this plan.

Did you wish to be heard on that, Mr. Marx?

Mr. Marx: Yes, your Honor. I wanted to point out in view of your opinion that that objection is insuperable, an amendment to the plan providing that the Burchill Act proceeding be brought simultaneously and forthwith would seem proper and as a matter of fact I understand that the Guaranty Trust Company of New York already has the complaint drafted. That would not be adverse to certificate holders and it might be proper to submit an amendment as to that.

The Court: Mr. Marx, did you give some thought to this too: the certificate holders should have another chance instead of the court determining whether or not the amendment is adverse, they should have another chance when this new plan is developed, this new arrangement—that is what it is in this court under Chapter XI—to consider that matter over again together with their consideration of the proceeding under the Burchill Act and the plan there offered?

Mr. Marx: You understand my worry here as to the delay and expense and the keeping of this thing up in the air that a new arrangement might cause rather than amending this one, which would seem to me to be perfectly feasible.

The Court: How much extra expense would there be?

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Mr. Marx: We have to formulate a new arrangement and get new acceptances again and that might be a long procedure. Some of the committees we may be able to get together with; with others I think we are as far apart as the poles, because the theories we are proceeding on are entirely opposed.

The Court: Well, Section 376, which is part of Chapter XI, provides that if the confirmation of the arrangement is refused, that the court shall, if the proceeding was instituted under Section 322, as this one was, among other things dismiss the proceeding under this chapter. It may either do that or adjudicate the debtor a bankrupt and the debtor in this case is not a bankrupt according to the testimony adduced here. So the only other alternative is to dismiss the proceeding under this chapter, and that has to be done on notice under subdivision 2 of Section 376. That reads as follows: "Where the petition was filed under Section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or"—and this is the one under which I would have to act—"or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

Mr. Arkush: There is the alternative proceeding under Section 364 where, if you fail to find "that the proposed alteration or modification does not materially and adversely affect the interest of any creditor who has not in writing assented thereto, the court shall adjourn the meeting, or, if closed, reopen the meeting and may enter an order that any creditor who accepted the arrangement and who fails to file

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with the court, within such time as shall be fixed in the order, his rejection of the altered or modified arrangement, shall be deemed to have accepted the alteration or modification and the arrangement so altered or modified, unless the previous acceptance provides otherwise."

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The Court: That is, the alteration or modification.

Mr. Arkush: That is what we propose, to try to see if we can agree on an alteration or modification, and then if your Honor feels that you do not want to accept the proposal in deciding that this alteration or modification does not materially or adversely affect the creditors, a short notice may be given under Section 364.

The Court: What do you think of that, Mr. Rickaby?

Mr. Rickaby: I have no objection to that as long as it is perfectly clear that the income from this property is segregated and put apart for the benefit of certificate holders, and I think it ought to be paid over to the trustee under the mortgage, the Guaranty Trust Company, reserving perhaps enough for ordinary operating expenses.

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The Court: Before I would even consider that I will say now, as I stated to the attorneys in chambers when they were up on those motions the other day, that I don't think it is right. It is not fair that these certificate holders should be without their interest that has been earned. It was earned and payable June 1st. You see, some of us may be very fortunate in that we don't have to worry about things like that if a dividend does not come in or if a payment is not met on an obligation. But to a good many of these people that may be a very serious thing, and I should think, counselor, that since you represent a good many of these institutions as trustee, that you would be very much interested in seeing that this interest was paid so that they could make disbursements to the beneficiaries of the trust.

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Mr. McLanahan: Yes, your Honor. I had a short conference with counsel for the debtor just before the hearing and I understand—I may be mistaken—but I was under the impression that it would be possible to arrange for the payment of that interest by August 10th, as I remember the date. Is that correct?

Mr. Marx: Yes. Mr. Flohr is here and he has the figures if you would like to examine them.

The Court: Yes.

Mr. Flohr: The earnings for the six months to June 1st are \$37,914.83 on account of interest.

The Court: You mean the net?

Mr. Flohr: The net earnings available for interest.

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The Court: What would that mean in the way of interest?

Mr. Flohr: It is about one per cent.

The Court: Is that all?

Mr. Flohr: Yes. You see, as trustee, in order for us to pay three per cent for this year the United States Realty & Improvement Company would have to advance—

The Court: Would they advance ordinary charges against the operating income of the building?

Mr. Flohr: Nothing.

The Court: What was the gross operating income?

Mr. Flohr: The gross income was \$439,000.

The Court: How did you spend it?

Mr. Flohr: Real estate taxes, \$163,000.

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The Court: What were they for?

Mr. Flohr: Real estate taxes for six months.

The Court: For the first six months?

Mr. Flohr: Well, they are actually accrued for these six months, which is not exactly a six months period.

The Court: You didn't pay the whole year?

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Mr. Flohr: No. We paid the first half.

The Court: You paid the first half?

Mr. Flohr: They don't actually figure out the same amount, but very very closely. \$174,000 in operating and maintenance expenses which includes payrolls and all other expenses.

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The Court: Have you a breakdown on that?

Mr. Flohr: I haven't it here.

Mr. Rickaby: How much to executives?

Mr. Flohr: Not over \$8,000.

The Court: You mean executives of the Trinity Buildings Corporation. Let us have that.

Mr. Flohr: Of anybody. Not over \$8,000. Repairs, \$37,000. Insurance, \$8,000. General and corporate expenses and other taxes, \$18,000. Which make a total of expenses of \$101,900 in round figures. Deducting that from the \$439,000 leaves the figure that I gave you before.

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The Court: Maintenance charges are as high as that?

Mr. Flohr: Yes, sir.

The Court: Just to operate the building for January, February, March, April and May, \$174,000.

Mr. Flohr: December, January, February, March, April and May.

The Court: I see, yes.

Mr. Marx: There are two buildings.

Mr. Flohr: They are both large buildings, of course. There are two.

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The Court: Are there any arrears of rents?

Mr. Flohr: There are some arrears but not a substantial amount.

The Court: Were any of the May rents paid after June

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1st that you haven't included in that?

Mr. Flohr: Not substantial. I couldn't say. There are some. I know there are some but they would not be a substantial amount.

The Court: Well, what do you mean by a substantial amount?

Mr. Flohr: They would not be \$5,000 I would say.

Mr. McLanahan: If your Honor please, do I understand that these monies are being held by the company there, or what is being done with them? Are they being conserved in any way?

Mr. Marx: Your Honor, I would like to read, to put on the record if you would like, a letter which was written on June 27th by Trinity Buildings Corporation of New York to the Guaranty Trust Company as mortgagee, which will settle this question:

"Gentlemen: Referring to the amended modification plan and arrangement of Trinity Buildings Corporation of New York, first mortgage 20-year 5½ per cent sinking fund gold loan due June 1, 1939, and guarantee thereof, this will advise that we have established a separate account in the Manufacturers Trust Company, in which there is a balance as of the close of business on June 24, 1939, of \$20,234. Such balance represents all rents collected commencing June 1, 1939, less all operating costs and other expenses of the corporation paid since that date."

The Court: What about what accumulated before that? That is the point.

Mr. Marx: What do you mean?

The Court: What about the rents, the net income of the building prior to June 1st? Those six months. Where is that?

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Mr. Marx: I want to show you that those are segregated and being held for their benefit.

The Court: Yes, presently.

Mr. Marx: I think there is another account which Trinity Buildings Corporation has which contains rents collected prior to June 1st, and I think there is some \$20,000.

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Mr. Flohr: \$23,000.

The Court: What do you mean by prior to June 1st?

Mr. Flohr: Well, our balance of June 1st, 1939, was \$23,000—the cash balance.

The Court: You mean the net?

Mr. Flohr: Money in the bank.

The Court: Of what?

Mr. Flohr: Of the Trinity Buildings Corporation. There was \$23,000 in the bank. That was after paying our taxes for the first half of the year.

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The Court: I thought you said there was \$37,000 balance.

Mr. Flohr: No, I said there were earnings for six months up to that time.

The Court: What became of the difference of \$14,000?

Mr. Flohr: Well, I would have to make an analysis of the accounts, but you must bear in mind that the interest that was paid even for the previous six months was not earned. So that it is quite possible that some of that money was used to pay a previous interest payment.

Mr. Marx: Your Honor, these books are kept on an accrual basis and not on a cash basis and certain of the expenses and charges are accrued and prepaid insurance and things like that are carried as an asset.

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The Court: What do you mean? They were used? Rents collected, for instance, in December, were used to pay the interest due on December 1st?

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Mr. Flohr: We borrowed some money from the bank in order to pay the interest due on December 1st and paid off the loan.

036 The Court: Why shouldn't that be paid over to the corporation? Wouldn't the guaranty cover that?

Mr. Flohr: I can't answer that.

Mr. Marx: Your Honor, the Trinity Buildings Corporation of New York last December in order to meet the interest requirement on these certificates borrowed money from the bank.

The Court: How much did it borrow?

Mr. Flohr: Well, to the best of my recollection it was \$20,000. I am not sure of that figure. It may have been \$15,000.

037 Mr. Marx: The bank was repaid through rents collected after December 1st. Now, if the guarantor had met that obligation, why the guarantor would have been repaid. He would have been subrogated to the rights of the certificate holders.

The Court: Then he would have been in court December 1st instead of June or May, whatever it was.

Mr. Marx: The certificate holders got one more interest coupon.

The Court: In other words, the guarantor has been repaid that money. That is the point, isn't it?

Mr. Marx: No, sir.

038 Mr. McLoughan: That is the effect of it.

The Court: Of course it is.

Mr. Marx: If the guarantor met his guarantee he would have been subrogated to the lien.

The Court: If he had attempted to exercise it things would have been forced to a head last January or Decem

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ber. I don't think you have a right to charge against the rentals for these six months what you borrowed from the net income for those six months in order to pay your interest due last December 1st.

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Mr. McLanahan: I don't know whether the debtor or at least the company is in a position to maintain its corporate existence—I imagine it is—without the use of the funds collected from these buildings. But certainly it should not apply any of the rents collected from these buildings while the interest is in default for the payment of any other expenses of that corporation. It should apply all these net rents it seems to me to the payment of the interest to the certificate holders. If it is of advantage to the certificate holders to keep the guarantor's corporate existence continuing, and if there are any direct benefits flowing from that to the certificate holders, why that is another matter. But it seems to me that the income from these properties should be applied to the payment of taxes and interest on the mortgage.

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The Court: And it should not have been used to reimburse the Realty Company for what it otherwise—at least to make good what the Realty Company should have made good under its guaranty in December. You see, it only goes to show how complicated this situation is. I really think that the proper course is for the Realty Company, the United States Realty Company, to reorganize all of this including its intercompany obligations, and the obligations of its subsidiaries under Chapter X.

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Mr. Rickaby: Absolutely.

The Court: You see, all of these things—you see this thing is an intercompany arrangement unfortunately. And under Chapter X you could have all of those things checked

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up and the rights of the various groups determined in respect to that income.

042 Mr. Marx: That is very true, your Honor, but the Realty Company feels that it can live if we can get an adjustment of this without the necessity of taking care of all the other securities.

Mr. Rickaby: Yes, chisel us and take care of the others.

The Court: Now wait a minute. There is another feature that you must give consideration to. There is the debenture holders secured by the G. A. F. Company stock, and they are getting six months—

Mr. Marx: They are selling for 25, and these bonds are selling for 44.

043 The Court: The point is this: if the rents of this property are being used to make good the obligation of the United States Realty Company under its guaranty indirectly—that is what it amounts to—while general income from the United States Realty Company, say, from its Whitehall Building, is being used to pay interest on these debentures secured by the G. A. F. stock, then those debentures are being preferred out of the general income over these certificate holders who have a claim under the guaranty, as I see it.

Mr. Flohr: Well, any interest that would have to be made good under our guaranty would come out of the general income of the United States Realty & Improvement Company.

044 The Court: You see, you haven't been taking it that way. You took it out of the next lot of rents and you borrowed money from the bank in the meantime. At least that was done last December. And then we find that the rents for the following six months are used to pay the interest that was due on the prior interest date. That is what it amounts to, doesn't it?

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Mr. Flohr: I don't think so.

The Court: Oh, no question about it.

Mr. Marx: Your Honor overlooks that the Realty Company would be subrogated to the lien of the certificate holders. If it met its guaranty it would be *pari passu* with them in sharing it.

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The Court: That may very well be, but the point is that if that had been known six months ago, why the creditors might have sought a reorganization under Chapter X.

Mr. Rickaby: Of course, if your Honor should dismiss this proceeding now the thing that Mr. Marx is naturally worried about and wants to keep the present proceeding alive because concededly a proceeding could be instituted under Chapter X whether the present debtor likes it or not.

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Mr. Marx: There was no default at the time in December, which seems to disturb everybody.

The Court: But the interest had not been earned. That is the point.

Mr. Flohr: It was not earned for a year and a half before or two years before that and we paid it.

The Court: Well, how did you pay it?

Mr. Flohr: We paid it by advancing money.

The Court: The company did.

Mr. Flohr: The company did, yes, sir.

The Court: But this time you had the Trinity Buildings Corporation go to the bank and borrow it.

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Mr. Flohr: I don't know that there is anything very unusual about that.

The Court: Tell me, was the money thus advanced paid back later on?

Mr. Flohr: Yes, sir, it was, to the bank—no, not the money that we advanced.

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The Court: That is the point. For a year before that you had advanced money to take care of your guaranty, is that right?

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Mr. Flohr: Yes, sir.

The Court: And for that you have not been reimbursed?

Mr. Flohr: That is right.

The Court: So that this is the only six months period during which this procedure that you have outlined was followed.

Mr. Flohr: Well, I wouldn't be so sure about that either. We may have done it to pay taxes where taxes had to be paid in advance of the time the money was earned.

The Court: I am not talking about that. I am talking about interest, not about taxes.

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Mr. Flohr: I couldn't answer that without consulting. It would not stick with me. It was not with me an unusual procedure.

The Court: Wouldn't you remember whether or not the net income of a certain six months' period was used to supplement the net income of the prior six months' period in order to pay the interest on these Trinity Buildings Corporation certificates.

Mr. Flohr: No, sir, I would not. I would think that would be all right.

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Mr. Marx: Your Honor, in addition to that, for several years when there was no need to pay the sinking fund by reason of the mortgage moratorium I believe the United States Realty Company paid the sinking fund payments.

Mr. Arkush: May I make a suggestion?

The Court: Yes.

Mr. Flohr: There is a point here, your Honor, that is brought up, that I think is important. We borrowed this

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money on the 1st of December. Now the taxes in effect had been prepaid for an amount approximating \$27,000 and the amount of this loan that was made to pay interest was really to get back part of the money that we paid for taxes in advance. So that actually we didn't use the earnings of the subsequent period to pay interest but rather used them to pay taxes.

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The Court: Well, in this case, however, so far as June 1st was concerned, you had paid a half year's taxes, so that you were a month ahead, weren't you, in figuring out the rental? I mean if you are going to apply that principal at one end, you can apply it at the other.

Mr. Flohr: Yes, sir, that is true. At June 1st there was a month's taxes paid in advance.

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The Court: So that what happened was this: this six months' net income from the building has been charged with taxes for December of the prior year—has been charged with seven months' taxes.

Mr. Flohr: No, sir, it has not; six months.

The Court: Of course. Why not?

Mr. Flohr: Because at December 1st we had a month's taxes paid in advance and on June 1st we had a month's paid in advance.

The Court: I know, but you paid the June 1st taxes and you say you were really borrowing money from the bank to pay the month of December taxes. You consider the year as having twelve months and divide the taxes accordingly. If you were borrowing for that—

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Mr. Flohr: I didn't really say that we were borrowing for it. I say that the taxes had been paid in advance, so that in effect we were just replacing money—

The Court: Here you have a situation where there is a

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month's taxes paid in advance when you figure June 1st. I don't see that the argument cures the situation any.

054 Mr. Marx: We were trying to figure out what, if any, interest could be paid to these certificate holders and I believe in the event the proceeding is not dismissed—

The Court: That is what led up to this discussion, how much money there should be available now, and I was surprised it was only \$37,000 out of a gross income of \$439,000. Of course I haven't any way of deciding it. You would need an accountant to determine it.

Mr. Marx: We would be glad to have any accountant in.

The Court: It goes back to the point we were discussing, whether or not this interest should be paid, the interest that has been earned, should be paid to these debenture holders.

055 Mr. Arkush: May I address you a moment?

The Court: Yes.

Mr. Arkush: As I understand it, there are two questions before your Honor. First, shall you dismiss—

The Court: Under Section 376, subdivision 2.

Mr. Arkush: So as in effect to force the U. S. Realty Company into Chapter ~~X~~ X, or shall you hold the proceeding to see whether the parties or as many as possible of the parties, can agree on an alteration or modification which can be submitted to the certificate holders. The other question before your Honor is, if you do hold the proceeding, how much, if any, shall now be paid to the certificate holders?

05 On the first question, I feel very strongly that it is very much against the interest of these certificate holders to have a Chapter X proceeding at this time, particularly for this reason: that the debenture holders whose obligations would otherwise not become due till January 1st, 1944, would immediately be in a position to exact their full claim against

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this estate and they will make the argument that the Trinity certificate holders having security presumably of the value of their principal, should have no share in any reorganization of the guarantor's estate. And it is very likely that that position will be sustained by the court because it is very evident that the value of the security is uncertain and the amount of any deficiency, if any, which might be established against this estate of the Trinity certificate holders, can be discounted at the present time, and that the Trinity certificate holders would be under a very precarious position under Chapter X proceedings. That is the principal argument.

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The second one is one of splitting the certificate holders. The principal certificate holders are represented by Mr. McLanahan and the small certificate holders by various committees. If you exclude those certificates you have got an average holding of \$2100 and these certificate holders want their security in good standing. Certainly the institutions want their security in good standing.

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Finally, a Chapter X proceeding with as complicated a situation as this is going to take years.

The Court: Oh, no.

Mr. Arkush: That is my opinion. We have a very simple proceeding over in Jersey where there is a similar procedure. That has been over there for a year and a half. There are going to be long fights and there are going to be appeals and the S. E. C. is going to have a lot to say and it is going to be a matter of years.

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Now on the question of the amount of interest that ought to be paid, I think that the debtor would be well advised to make a contribution right now to the amount of interest to

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1060 be paid entirely aside from any question of accounting as to what the property has earned. And I think if you take the \$37,000 and increase that as much as the debtor is willing to make a round payment of say two per cent or $1\frac{3}{4}$ per cent for six months, it would better the position of the debtor and they would get credit for it in the plan. The only legal weakness, the one technical weakness of this present plan, and I think the one reason why Mr. Rickaby has been in such a strong position in attacking the plan is that the certificate holders have been asked to give up something that has accrued to date. I think the debtor would be well advised to make up as much of that as possible even before an amended plan is negotiated and then in the amended plan I think they would be well advised to agree to pay the rest of it, not necessarily now, it may be paid over a course of years. That is a matter of negotiation. But at least they ought to close up that hole in the plan and take that argument away from Mr. Rickaby.

1061 The Court: I don't think he would object to that.

1062 Mr. Arkush: Now, on the procedure, now that the institutions are represented, and I am glad that they are represented, I do think that in a couple of days we may get together and that even Mr. Rickaby would be won over. We could get together in your Honor's absence. There would not need to be an adjournment. Your Honor could have the altered plan sent to you. You could sign a short order permitting it to be filed. That would not be an approval, it would simply be an order permitting it to be signed and permitting the debtor to send copies of it for acceptance.

The Court: Is it your idea that a Burchill Act proceeding would be instituted at the same time?

Mr. Arkush: A Burchill Act proceeding to be instituted at the same time.

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The Court: Offering the same plan?

Mr. Arkush: Offering the same plan.

The Court: With modifications that would meet the obligation of the principal mortgagor?

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Mr. Arkush: That is right.

The Court: That would mean the same in respect of the length of time—

Mr. Arkush: Yes.

The Court: The amount of interest?

Mr. Arkush: Precisely the same.

The Court: The sinking fund and things like that?

Mr. Arkush: Precisely the same plan. A point which I have not investigated about which perhaps Mr. Marx can advise, is that the certificate holders or the trustee in their behalf can't safely institute a Burchill Act proceeding without endangering the guarantee in case the Chapter XI proceeding did not go through. That was the reason for postponing the Burchill Act proceeding for this proceeding because you might lose your guarantee.

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Mr. McLanahan: On behalf of these institutions I strongly support that position. I think it would be unfortunate to delay these proceedings and drag them out into a Chapter X proceeding. I myself have great misgivings as to time and expense and complications involved in a Chapter X proceeding, and I know it is the desire of these institutions to save all expense possible and to proceed with this proceeding, if it can be done, by such an amendment as has been suggested, so that the Burchill Act proceeding can go along simultaneously, and I was to urge your Honor to consider that procedure rather than a dismissal of these proceedings at this time and the necessity of instituting new proceedings under Chapter X.

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Mr. Rickaby: I make this suggestion: —

1066 The Court: Meet the point which has just been raised. What do you say now? Do you think these proceedings should be dismissed or do you think there should be an amended plan that would be consistent in its provisions with a proceeding under the Burchill Act in respect to the reorganization of the principal obligation, or should this proceeding be dismissed?

Mr. Rickaby: I say this, your Honor, I have very little hope of getting together on an amended plan unless a substantial part of this equity is turned over to the certificate holders.

The Court: What equity?

1067 Mr. Rickaby: I mean of the stock of the Trinity Buildings. For instance, this Trinity Building, as I pointed out before, it is not impossible that that may not be worth—

The Court: They will give you the property.

Mr. Rickaby: The other people are not willing to take it back. There may be something worked out in the way of an intervening preferred stock or something like that.

The Court: Now, would you mind answering a few questions?

Mr. Rickaby: No, sir.

The Court: Do you favor an amendment of this plan under Chapter XI instead of a dismissal of this arrangement?

1068 Mr. Rickaby: A possible amendment might be satisfactory. I am inclined to think that there should be a dismissal.

The Court: Which do you think is a better course? I want to know.

Mr. Rickaby: I think a dismissal is better.

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The Court: Is better than an amendment?

Mr. Rickaby: I think a dismissal is better. I think we can come in under Chapter X and do better. I would not insist on that, your Honor, to this extent, and I was going to make this suggestion: that if Mr. Arkush's suggestion was followed—for instance, if immediately half of the interest that is now due was paid and if the guarantor contributed whatever amount was necessary over and above the funds available to the Buildings Corporation to make that payment, I should be perfectly content to sit down and try to work something out. But bear in mind that if nothing like that is done and you just adjourn this proceeding, you are precluding the trustee for these certificate holders by virtue of the existing injunction from bringing a suit against the debtor in this proceeding for the installment of interest which is now due. And that suit would be prosecuted and there would be no defense to it. So that from the standpoint of self-preservation it would seem sensible for the debtor to be willing to do something as I have suggested.

The Court: When you say half of the interest, what do you mean? One-half of three per cent? What do these certificates carry?

Mr. Arkush: Five and a half per cent.

Mr. Rickaby: There is a coupon for six months' interest now due. That would be $2\frac{1}{2}\%$. I should say that they ought to pay half of that. Whatever that figures out. I am not so quick on my mathematics as I used to be.

Mr. Marx: One and three-eighths.

The Court: Well, make it one and a half and call it a day.

Mr. McLanahan: I feel very strongly, if your Honor please, that we would go a great way to prevent the dis-

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missal of all these proceedings and the institution all over again of Chapter X proceedings. I think it would be very unfortunate. I think the certificate holders would lose a great deal more in the added expense than they would lose by the delay or by their not receiving a portion of the interest now due. I agree with Mr. Rickaby that there should be every possible effort made by the debtor and the debtor should be compelled to make such an effort to meet as large a portion of this interest as possible. And I say that if the debtor would meet one-half of the $2\frac{3}{4}$ per cent or whatever it is, that the certificate holders would—

The Court: I think Mr. Rickaby is right. If you are going to make any payment it ought to be $1\frac{1}{2}$ per cent.

Mr. Marx: We are perfectly willing to accede to Mr. Rickaby's request of $1\frac{1}{2}$.

The Court: What about the other committees?

Mr. Scheminger: My position is this. I represent the Earl Committee. Assuming that this $1\frac{1}{2}$ per cent were paid, I would be agreeable to an adjournment, but I would like some indication that there will be some modification of this plan on the part of the debtor. We have all talked about improving it and modifying it, but there has not been anything said to my knowledge of any substantial giving away on the part of the debtor.

Mr. Arkush: That is not so. There was a meeting with Col. Hartfield.

Mr. Rickaby: Let us not go into that.

Mr. Arkush: No. I think it would be prejudicial to discuss it before your Honor.

The Court: Yesterday there were two motions on in the bankruptcy part of the court in relation to applications by the debtor for leave to enter into a contract to sell two

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parcels of real estate, and those motions were referred to me by Judge Hulbert who was in the motion part. The attorneys came up to chambers and while we were talking about those two motions we got to discussing some of the other problems in this case and I indicated to them how I felt about some of the issues that had been raised, the legal points as well as involving the practical operation of the whole arrangement. I suggested that they get together, hold a meeting in advance of the session today, so that they could see what might be done to meet those objections. I told them that I felt it was not a feasible plan for the reasons that I have stated here on the record today, which was practically a repetition of what I told them yesterday. And I told them that I thought they might here today be prepared for the hearing in court here today if they immediately got the various committees together and the other attorneys who have appeared in the proceeding and start discussing the situation that is presented.

Mr. Marx: We did, your Honor, but unfortunately counsel for the various committees could not reach their committees. Of course that is natural on such short notice.

The Court: Would there be any objection then to this procedure: in view of the statement of the Court it is considered that such plan is not feasible for the reasons that have been stated, that an opportunity is to be afforded to the debtor to amend that plan so as to meet not merely the various objections of the special provisions of the plan but the main objection that there is no companion proceeding in the State court yet instituted which should be instituted, and also that this be on condition that 1½ per cent be paid to the certificate holders on the interest that was due on June 1st, and then of course, so that there will be no delay in the mat-

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ter, so that you can work along during the summer time, I intend to refer the whole matter, if I don't dismiss the proceeding, to one of the referees in bankruptcy, and let him handle all of the details from now on. In the meantime, the Securities and Exchange Commission if it desires to appeal from my denial of that part of its motion to dismiss on the ground that this court has no jurisdiction, as I held the court has jurisdiction under Chapter XI, it may take the necessary steps to get an appeal on the way if it desires a review of that issue by the Circuit Court of Appeals of this Circuit.

Let me say this: I don't believe there is a judge or referee in this building who would not in a Chapter XI proceeding permit the Securities and Exchange Commission to be heard as a friend of the court, and who would not welcome their assistance. So that from a practical viewpoint you have gained your point as soon as you are permitted to be heard as a friend of the court. You haven't any right of appeal under Chapter X, as I understand it. That is correct, isn't it?

Mr. Arkush: There is no right of appeal by the S. E. C.

The Court: Of course you are given such rights in connection with the presentation, consummation, and formulation of a plan, all of which I am sure the referee to whom I will send this matter would afford you in this Chapter XI proceeding without any specific provision of the Act itself, just the same as I would. The Court would want to lean on the investigations of the S. E. C. naturally because after all, what are we here for? To do justice. The longer you are here the more you will realize that the principal burden on the part of the judge or referee is to get all the facts. What are all the facts? You can't reach a decision until

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you know all the facts. So that the trial of a lawsuit or a proceeding is a search for the truth all the time.

Mr. Zolotar: Well, as your Honor understands, we are very grateful for the opportunity of being heard on this question that we have raised and we are also very glad that you have granted our motion for intervention. But our point goes a little further. We feel that although we have been permitted to participate to a limited extent in this proceeding that actually the provisions of Chapter XI do not permit us to do a good job. The provisions that do help us are in Chapter X.

The Court: I will say this: I won't retain jurisdiction of this matter. If I did, I would afford you an opportunity to do all that you could possibly do under Chapter X. And I state now on the record that I hope that the referee to whom the matter is referred will follow that very course, and I am sure that the debtor won't have any objection to it, either.

Mr. Arkush: I hope your Honor doesn't mean that you are going to force them to the rigmarole of waiting for a report and inserting a report to the certificate holders?

The Court: No. Of course, you would have to send out to the certificate holders anyway a proposed amended plan under Section 364. Is that the section?

Mr. Arkush: Yes, Section 364. The alteration has to be sent out.

The Court: And with that I assume the committees will send out letters if the Securities and Exchange Commission approves. Leaving out the question of jurisdiction and just considering it on its merits, I don't know that you need anything further.

Now, we have had a very complete discussion of this

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matter, but we have got to get down and enter some orders and do something in a very definite, practical, legal way, so that I can leave it in shape tomorrow.

There isn't any objection from anyone in the courtroom to a further amendment of this plan if concurrently there is a proceeding under the Burchill Act in the State court? Is that correct?

Mr. Zolotar: Well, our formal objection to the whole proceeding.

The Court: I know, that the court has no jurisdiction under Chapter XI and that you think it should be done under Chapter X.

Mr. Rickaby: I don't want to say there is no objection to an amendment, but I have no objection to an adjournment to see whether it may be satisfactorily amended.

The Court: How can it be—

Mr. Arkush: Technically it is not an adjournment. We have to reopen the hearing under Section 364.

The Court: I will reopen it and refer it to one of the referees. There is no objection to that course?

And one of the conditions would be that the certificate holders be paid $1\frac{1}{2}$ per cent interest.

The coupon called for what?

Mr. Marx: $2\frac{3}{4}$ %.

The Court: They will get $1\frac{1}{2}$.

Mr. Marx: Mechanically, I think we should present an order to your Honor before you go away.

Mr. Arkush: Yes. Mr. Marx, see that that order contains the proper provisions protecting the certificate holders so that the acceptance of the $1\frac{1}{2}$ per cent is without prejudice.

Mr. Marx: Certainly.

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The Court: Gentlemen, you will all have to get to work on this order this afternoon. I will adjourn this session we have had today until tomorrow, and I will give you until tomorrow at noon time to get your orders in shape and we will reconvene tomorrow at noon time. Meanwhile these various committees can agree on a form of order and I will enter a proper order on these various matters.

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Mr. Rickaby: I think there is one condition that should be imposed. The question of law has been raised that with the injunction pending here in this court, in this proceeding, that a Burchill Act proceeding which involves a foreclosure, that if the foreclosure were brought on without this debtor being a party, it might have some effect of releasing the debtor. I think this debtor should be required to deliver to the Guaranty Trust Company, the trustee of the Trinity Buildings Corporation, an agreement that such an institution of foreclosure should not operate—

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The Court: No, but that should be set forth in the arrangement and in your plan of reorganization under the Burchill Act.

Mr. Arkush: No, Mr. Rickaby is right, because if the plan would not go through we would lose our—

Mr. Rickaby: There should be a separate agreement filed with the trustee or else the injunction in this proceeding should be lifted to such an extent as to permit the debtor to be joined in the Burchill Act proceeding.

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Mr. Marx: That is mechanical.

The Court: Yes, that will be done. I suggest that you men confer this afternoon and that we just adjourn this hearing until tomorrow at twelve o'clock in this courtroom. Now, work out all the details, get all your papers in shape and then I will sign them before I leave tomorrow afternoon.

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Mr. Arkush: Does your Honor want an order of reference prepared?

090 The Court: Yes. The matter will be sent to a referee in bankruptcy. Not a special master. A referee in bankruptcy.

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(Adjourned until July 28, 1939, 12:00 noon.)

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Hearing before Judge Leibell—July 28, 1939.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy, No. 74,023.**

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[SAME TITLE]

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 28, 1939, 12.00 noon.

A P P E A R A N C E S :

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WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Henry M. Marx, Esq., of Counsel.

HAROLD A. SCHEMINGER, Esq.,

Attorney for Ralph W. Earl and

Donald M. Halsted, as members of

Bondholders Protective Committee.

SIMPSON, THACHER & BARTLETT, Esqrs.,

**Attorneys for Bondholders Committee of
which James A. Beha is chairman;**

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H. McAfee, Esq., of Counsel.

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a creditor;

Aaron Holman, Esq., of Counsel.

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J. A. PANUCH, Esq.,

Attorney for Securities and Exchange
Commission, Amicus Curiae.

George Zolotar, Esq., and

Marland Gale, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate
Holders.

The Court: The Securities and Exchange Commission, have you got your order for intervention?

Mr. Zolotar: Yes. I gave a copy to Mr. Marx, but I don't believe I have given a copy yet to any of the other parties.

The Court: Do any of the other attorneys wish to look at it?

Well, your sole purpose is to contest the jurisdiction of the court, isn't that it?

Mr. Zolotar: In this order, yes, your Honor.

The Court: It strikes me that you could have gone a little beyond that.

Mr. Zolotar: This order conforms with the motion that we have made.

The Court: It does? Does it?

Mr. Zolotar: Yes, I think it was limited for those purposes.

The Court: Let me see where your motion papers are. Did you have two motions before me?

Mr. Zolotar: Yes. We have an order with respect to the other motion also.

The Court: What was that motion?

Mr. Zolotar: That was the motion to dismiss on jurisdictional grounds.

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The Court: Now, I have made an endorsement on the back of your motion papers. There is the order on that one and here is the order on this. Now you can just take them up and my secretary will see that they are filed.

* * * * *

Now what other orders have you, Mr. Marx?

Mr. Marx: I have here two orders which all the parties have seen, one referring the proceeding to a referee in accordance with your Honor's statement yesterday and the other order providing for the payment of interest.

The Court: Any objection to the orders?

Mr. Zolotar: With respect to the order referring the proceeding to a referee, for the record we would like to note our objection, on the ground that we contend that this court has no jurisdiction over this proceeding.

The Court: Yes, that is already on the record.

Mr. Zolotar: Thank you.

The Court: Referee Joyce will be here in August, won't he, Mr. Lewis?

Mr. Lewis: I am so informed.

The Court: He has had a lot of experience in these real estate reorganizations. I think I will send this matter to Mr. Joyce.

Now on the order of reference I have stated, "Upon all the proceedings heretofore had herein, and pursuant to the direction stated on the record of the hearing on July 27, 1939, it is ordered"—I have stated that so that the referee will have before him my directions in the matter. It is just not a general reference. I want him to know what my position has been on a number of these issues that we had before us and on which we took testimony and received briefs and heard argu-

Hearing before Judge Leibell—July 28, 1939.

ment. All right, I have signed that. Is there anything further?

1102 Mr. McAfee: Your Honor, I hesitate to raise this because it is rather technical.

The Court: Whom do you represent?

Mr. McAfee: The Beha Committee. The motion of the Securities and Exchange Commission to dismiss the proceeding is on two grounds—one, on the jurisdictional ground; and secondly on the ground of fairness and feasibility.

The Court: Yes.

1103 Mr. McAfee: I have no doubt as to your Honor's intention, but I should like it to be plain on the record because the order submitted says simply "Denied." If that objection is too technical I think the mere statement on the record will be sufficient—for my purposes certainly.

1104 The Court: I think I already have made a statement under date of July 27th, that is, yesterday, in which I stated that the motion was denied insofar as it related to the jurisdiction of the court. I held that the court had jurisdiction under Chapter XI but I stated not merely on their motion but on other points, too, that were argued by other counsel in the case that in my opinion the proposed arrangement could not be confirmed, should not be confirmed by the court, because I did not deem it feasible, and further, that there were certain specific provisions in it that I thought were objectionable and I thought would have to be eliminated. It was then a question of a choice between two courses, one under Section 376, subdivision 2, to dismiss the proceeding and let the parties start all over again, or else under Section 364, I think, as pointed out by Mr. Arkush, to consider some amendment to the plan. Now, if the amendment would be just a patchwork, it would not serve at all. It would have to be

Hearing before Judge Leibell—July 28, 1939.

a recast arrangement or plan which would bear the title of an amended plan and on which the certificate holders would have to receive notice as required under Section 364, and which also would be the basis for the form of a consistent plan for the reorganization of the mortgage under the Burchill Act.

Now that is as clear as can be.

Mr. McAfee: Well, your Honor's statement serves my purpose.

The Court: Now that is on the record twice.

Mr. Arkush: I want to raise a technical question.

The Court: What is your point? Just a minute. I hear that Referee Joyce will not be here during August.

Mr. Arkush: I doubt whether we will get to a plan until the end of August, your Honor.

The Court: Referee Joyce is here now, isn't he?

Mr. Lewis: Yes.

The Court: He will be back at the end of August?

Mr. Lewis: I believe so.

The Court: The parties can go down and ask him to set a date for a hearing or for certain informal conferences before the hearing and at all these conferences you will want all the attorneys who have been receiving notice in this proceeding and also the committees to receive proper notice. Referee Joyce will be back the end of August?

Mr. Lewis: Yes.

The Court: Now, what were you about to say, Mr. Arkush?

Mr. Arkush: This is another technical question addressed to the order permitting the S. E. C. to intervene for the purpose of moving this court to dismiss the debtor's petition to deny confirmation of the debtor's proposed arrangement. Now suppose the S. E. C. appeals?

Hearing before Judge Leibell—July 28, 1939.

The Court: Read on. All on the basis of the court's acts.

1108

Mr. Arkush: What I have in mind is, suppose they lose their appeal? Are they still here for the purpose of attacking the arrangement?

The Court: They are here as a friend of the court anyway.

Mr. Arkush: They should not be here as an intervenor to attack the arrangement.

Mr. Zolotar: As I said before, this conforms very closely to the language we used in our original motion. I don't think there can be any question about it.

Mr. Arkush: Why not take out the words "to deny confirmation of the debtor's proposed arrangement"?

1109

Mr. Zolotar: That is one of the bases on which we urged the motion.

Mr. Arkush: Well, to deny confirmation of the debtor's proposed arrangement on jurisdictional grounds.

Mr. Zolotar: The grounds are stated in our motion and I believe it is covered fully here. All we urge is that the court ought to deny the confirmation of the debtor's proposed arrangement because the court lacked jurisdiction.

Mr. Marx: I believe that your Honor's statement on the record that it is solely on the jurisdictional ground should suffice.

1110

The Court: I think that is what you wanted and that is what you have. I suppose it could be made a little clearer but let it stand.

• • • • •

*Exhibits Received into Evidence.***Debtor's Exhibit 1.**

	Total Gross Income (Rentals and Electric Cur- rent Sold &c.)	Real Estate Taxes	Interest on the First Mortgage Loan.	Other Operating and Maintenance Expenses	Income or Loss* Before Provision for Depreciation	1111
1934 ..	1,260,778.84	337,280.00	221,446.93	380,121.55	321,930.36	
1935 ..	1,079,495.08	338,400.00	212,464.45	427,819.58	100,811.05	
1936 ..	1,009,896.98	324,000.00	207,220.00	533,434.05	54,757.07*	
1937 ..	1,049,027.74	328,440.00	204,077.50	537,293.17	20,782.93*	
1938 ..	915,029.49	328,892.50	204,077.50	433,606.37	51,546.88*	

Debtor's Exhibit 2.

The operations for the six months ended May 31, 1939, show earnings towards the payment of interest in the amount of \$37,914.83 as follows:

Gross Income	\$439,877.45
Real Estate Taxes	163,043.06
Other Operating and Maintenance Ex- penses	238,919.56
Balance available for interest	37,914.83

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Exhibits Received into Evidence.

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Debtor's Exhibit 3.

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(See Opposite)

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*Exhibits Received into Evidence.***Debtor's Exhibit 3.**

STATEMENT SHOWING THE ESTIMATED NET INCOME OF TRINITY BUILDINGS CORPORATION OF NEW YORK FOR THE THREE YEARS AND ONE MONTH ENDING DECEMBER 31, 1941 AVAILABLE FOR PAYMENT OF INTEREST.

	6 Mos. Ended May 31, 1939 (Actual)	7 Mos. Ending Dec. 31, 1939 (Estimated)	13 Mos. Ending Dec. 31, 1939 (Estimated)	Year Ending Dec. 31, 1940 (Estimated)	Year Ending Dec. 31, 1941 (Estimated)
Gross Income:					
Rents	412,456.89	445,057.43	857,500.00	758,000.00	758,000.00
Electric Current Sold	26,916.35	30,725.72	57,600.00	53,100.00	53,100.00
Misc. Income	504.21	420.08	900.00	800.00	800.00
	<u>439,877.45</u>	<u>476,203.23</u>	<u>916,000.00</u>	<u>811,900.00</u>	<u>811,900.00</u>
Less:					
Real Estate Taxes	163,043.06	182,002.07	345,000.00	310,000.00	310,000.00
Other Operating and Maintenance Expenses					
Operating Expenses	174,364.93	197,515.54	372,000.00	337,800.00	337,800.00
Repairs & Tenant Changes	37,591.71	24,369.17	61,900.00	54,300.00	54,300.00
Insurance	8,362.69	9,660.68	18,000.00	16,200.00	16,200.00
General & Corporate Expenses & other Taxes	18,600.23	15,525.50	34,100.00	31,700.00	31,700.00
	<u>238,919.56</u>	<u>247,070.89</u>	<u>486,000.00</u>	<u>440,000.00</u>	<u>440,000.00</u>
Total Other Operating and Maintenance Expenses					
	<u>238,919.56</u>	<u>247,070.89</u>	<u>486,000.00</u>	<u>440,000.00</u>	<u>440,000.00</u>
Total Taxes and Other Operating and Maintenance Expenses					
	<u>401,962.62</u>	<u>429,072.96</u>	<u>831,000.00</u>	<u>750,000.00</u>	<u>750,000.00</u>
Net Income available for Interest	<u>37,914.83</u>	<u>47,130.27</u>	<u>85,000.00</u>	<u>61,900.00</u>	<u>61,900.00</u>
Fixed Interest Requirements under Amended Plan			<u>120,591.25</u>	<u>111,315.00</u>	<u>111,315.00</u>

Exhibits Received into Evidence.

Debtor's Exhibit 4.

UNITED STATES REALTY AND IMPROVEMENT COMPANY.

PRO FORMA ESTIMATED BALANCE SHEET AS AT JUNE 1, 1939.

Giving effect to adjustment of the assets in accordance with Note 1,
the elimination of reserves and the resulting adjustment of the Deficit
Account.

ASSETS	LIABILITIES
Current Assets:	Current Liabilities:
Cash	Accounts payable
Accounts and accrued interest receivable	Accrued taxes and interest
\$ 335 095.32	\$ 1 143.30
58 984.80	73 773.29
Total Current Assets	Total Current Liabilities (Exclusive of Notes Payable and sinking fund payments due within one year)
394 080.12	74 916.59
Sinking Fund Deposit	Debentures and notes payable (for sinking fund payments due within one year, See Note 2)
60.14	Fifteen Year Sinking Fund, 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—
Investments in and Advances to Subsidiaries:	(See Note 4) \$2 162 500.00
Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	Less—Held in treasury
\$ —	(See Note 4) 959 000.00 \$1 203 500.00
Lawyers Building Corporation	6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$22,000.00 principal amount retired)
G. A. F. Realty Corporation	(See Note 4) 1 187 000.00
375.00	Less—Held in
Whitchell Improvement Corporation (Including mortgage receivable of \$1,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	1 135 500.00
5 200 000.00	Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$1,000,000.00 on Whitchell Building)
Blaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00; 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each	3 000 000.00
—	Note Payable, 4%, due \$37,500.00 on
Note receivable, 4%, due August 30, 1940 (Deposited as collateral to Note Payable of \$137,500.00)	
137 500.00	
5 337 875.00	
Investment in George A. Fuller Company, 7,786 shares of 4% Cumulative, Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(of which	

Investments in and Advances to Subsidiaries:

Trinity Buildings Corporation
of New York (Including Capital
Stock - \$1,000,000)

\$ —

Lawyers Building Corporation

—

G. A. F. Realty Corporation

375.00

Whitehall Improvement Corpora-
tion (Including mortgage receiv-
able of \$1,000,000.00 pledged to
secure Note Payable of \$3,000,-
000.00)

5 200 000.00

Plaza Operating Company—Non-
interest bearing demand note in
principal amount of \$3,930,000.-
00, 25,000 shares of Preferred
Stock, par value \$100.00 each
and 34,483 shares of Common
Stock, par value \$1.00 each

—

Note receivable, 4%, due August
20, 1910 (Deposited as collateral
to Note Payable of \$137,500.00)

137 500.00

5 337 875.00

Investment in George A. Fuller Com-
pany, 7,786 shares of 4% Cumu-
lative Convertible Preferred
Stock, par value \$100.00 each, and
7,893 shares of Common Stock,
par value \$1.00 each—(of which
7,331 shares of 4% Cumulative
Convertible Preferred Stock and
2,007 shares of Common Stock
having a quoted market value of
\$366 700.00 are deposited as col-
lateral to Note Payable of \$137,-
500.00)

477 300.00

Notes receivable, investments in
and advances to other real estate
companies, and investments in
other stocks and bonds

(See Note 2)

555 654.95

Unimproved real estate

290 000.00

Office furniture and fixtures

1 458.18

Prepaid expenses, etc.

20 087.53

\$ 7 076 515.92

See attached sheet for notes 1, 2, 3, 4 and 5 which form an integral

payments due within one year,
 Debentures and notes payable (for sinking fund payments due within one year, See Note 3):

Fifteen Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—

(See Note 4) \$2 162 500.00

Less—Held in treasury

(See Note 4) 959 000.00 \$1 203 500.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$222,000.00 principal amount retired)

(See Note 4) 1 187 000.00

Less—Held in

treasury 57 500.00 1 135 500.00

Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$1,000,000.00 on Whitehall Building)

3 000 000.00

Note Payable, 4%, due \$37,500.00 on November 30, 1939 and \$37,500.00 quarterly thereafter until August 30, 1940 when balance becomes due (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$137,500.00 Note of Plaza Operating Company)

137 500.00 5 476 500.00

Capital Stock:

Authorized and issued—900,000 shares without par value—stated value

18 000 000.00
 (16 474 900.67)

Deficit

Contingent liabilities (see Note 5)

\$ 7 076 515.92

part of this Pro Forma Estimated Balance Sheet.

*Exhibits Received into Evidence.**Debtor's Exhibit 4.***UNITED STATES REALTY AND IMPROVEMENT
COMPANY****NOTES TO THE PRO FORMA ESTIMATED BALANCE SHEET
As at June 1, 1939.**

- 1126
- (1) The amounts shown on this Balance Sheet with respect to assets are quoted market values as at June 1, 1939, or values estimated by Arthur J. Flohr, Vice President and Treasurer of the United States Realty and Improvement Company, in his testimony as to such assets on July 7th, 1939. Some of these assets are included at no value or at nominal values and, undoubtedly, some have potential values in excess of the amounts at which they are included.
- 1127
- (2) Voting trust certificates representing 8,576 shares of Class "B" Common Stock of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for its guarantees of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation Fifteen-Year Sinking Fund 6% Gold Debentures and as security for the 6% Sinking Fund Debentures, due January 1, 1944, of United States Realty and Improvement Company, subject to an agreement to surrender such stock to Fuller Building Corporation in the eventuality of a lack of certain earnings by that corporation.
- 1128
- (3) Sinking fund payments due within one year—
G. A. F. Realty Corporation, Fifteen-Year Sinking Fund 6% Gold Debentures—\$153,000. (which may be paid in cash or in debentures at the redemption price of 102).

*Exhibits Received into Evidence.**Debtor's Exhibit 4.*

United States Realty and Improvement Company holds \$959,000. principal amount of these debentures which may be used for sinking fund purposes.

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United States Realty and Improvement Company, 6% Sinking Fund Debentures due January 1, 1944—\$14.37 on November 15, 1939 and on May 15, 1940 for each \$500. principal amount of Debentures theretofore issued (which may be paid in cash or in debentures at the redemption price of 102). The Company holds \$51,500. principal amount of these debentures which may be used for sinking fund purposes. (see Note 3)

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- (4) The 6% Sinking Fund Debentures of United States Realty and Improvement Company were and are being issued pursuant to a Trust Agreement and the Reorganization Plan of G. A. F. Realty Corporation in exchange for 6% Debentures of the latter company on a par for par basis. G. A. F. Realty Corporation 6% Debentures so acquired, less amounts used for sinking fund purposes, are shown as held in treasury.

(5) Contingent Liabilities—

- (a) Guarantee of the principal, interest and sinking fund payments on the First Mortgage Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan Certificates, dated June 1, 1919, of Trinity Buildings Corporation of New York. \$3,710,500.00 principal amount of these certificates and interest of \$102,038.75 were unpaid at June 1, 1939.

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- (b) Endorsement of the note payable for \$50,000, due \$25,000, July 30, 1939 and \$25,000 on August 30,

*Exhibits Received into Evidence.**Debtor's Exhibit 4.*

- 1132 • 1939 of Plaza Operating Company, which note has since been paid.
- (c) Proposed deficiency in Federal income taxes for 1933 which is being contested—approximately \$45,000.00. The company's Federal income tax returns for the years 1935 to 1938 inclusive, are subject to review by the United States Treasury Dept.
- 1133 (d) A proposed assessment of intangible personal property taxes by the City of Jersey City, N. J., for the years 1937 and 1938 in an indeterminate amount.
- (e) The Company reports no further contingent liabilities except in respect of pending routine litigation, claims for personal injuries, etc., which, in the opinion of the Company's counsel, will not result in losses of any consequence.
- 1134

*Exhibits Received into Evidence.***Debtor's Exhibit 6.**

WHAT IS THE CASH BALANCE OF THE DEBTOR AS AT MAY 31, 1939, AND YOUR ESTIMATE OF CASH RECEIPTS AND DISBURSEMENTS FOR THE PERIOD JUNE 1, 1939 TO DECEMBER 31, 1941? 1135

The Cash Balance of the debtor at May 31, 1939 was \$335,095.32
The estimated cash receipts and disbursements for the period from June 1, 1939 to December 31, 1939 are as follows:

RECEIPTS

Income from Investments	\$236,400.00	
Investments liquidated	20,600.00	
Receipt from sale of real estate	50,000.00	
	<hr/>	\$307,000.00

DISBURSEMENTS

Interest Payable	\$131,300.00	
General and Corporate Expenses	38,300.00	
Miscellaneous Taxes	13,000.00	
Provision for meeting the guarantee of Trinity Bldgs. Corp.		
1st Mortgage	35,000.00	217,600.00
	<hr/>	

Estimated Net Cash Receipts for the seven months ending Dec. 31, 1939	89,400.00
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Estimated Cash Balance at Dec. 31, 1939	\$424,400.00	1137
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The estimated cash receipts and disbursements for the calendar year 1940, are as follows:

RECEIPTS

Income from Investments	\$333,300.00	
Investments liquidated	142,800.00	
	<hr/>	476,100.00

*Exhibits Received into Evidence.**Debtor's Exhibit 6.***DISBURSEMENTS**

1138	Interest Payable	260,000.00	
	General & Corporate Expenses	68,900.00	
	Miscellaneous Taxes	24,400.00	
	Purchase of Debentures for Sinking Fund	30,000.00	
	Provision for meeting the guarantee of Trinity Bldgs. Corp. 1st Mortgage	49,000.00	432,300.00

Estimated Net Cash Receipts for the year ending December 31, 1940

1139 Estimated Cash Balance at Dec. 31, 1940 \$46,000.00

The estimated cash receipts and disbursements for the calendar year 1941, are as follows:

Estimated Cash Balance at Dec. 31, 1940 \$46,000.00

RECEIPTS

Income from Investments	\$329,200.00	
Investments Liquidated	13,300.00	
		\$342,500.00

DISBURSEMENTS

1140	Interest Payable	254,600.00	
	General and Corporate Expenses	68,900.00	
	Miscellaneous Taxes	24,400.00	
	Purchase of Debentures for Sinking Fund	30,000.00	
	Provision for meeting the guarantee of Trinity Bldgs. Corp. 1st Mortgage	49,000.00	426,900.00
	Estimated Net Cash Disbursements for the year ending December 31, 1941		

Estimated Cash Balance at December 31, 1941 \$38,000.00

*Exhibits Received into Evidence.***Debtor's Exhibit 10.****ANNUAL STATEMENTS TO STOCKHOLDERS OF
DEBTOR FOR YEARS 1930 THROUGH 1938**

1141

[Pursuant to Stipulation dated September 13, 1939, the nine pamphlets comprising this exhibit have not been printed, but may be referred to by the parties, in which event copies will be furnished for use of the appellate court.]

[Debtor's Exhibits 5, 7, 8 and 9 have been omitted pursuant to stipulation].

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*Exhibits Received into Evidence.***Earl Exhibit B.**

[as abridged by stipulation dated September 13, 1939].

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

and

**THE NATIONAL CITY BANK OF NEW YORK
AGREEMENT OF PLEDGE**

Dated: February 10, 1936.

AGREEMENT, dated February 10, 1936, between UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as the "Company"), party of the first part, and THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the "Trustee"), a corporation organized and existing as a national banking association under the laws of the United States of America, as Trustee under a Trust Agreement dated as of January 1, 1929, executed by the G. A. F. Realty Corporation to provide for an issue of Fifteen-Year Sinking Fund 6% Gold Debentures due January 1, 1944 (hereinafter referred to as the "Old Debentures"), and as Trustee under a Trust Agreement dated as of July 1, 1935, executed by the Company to provide for an issue of Six Per Cent Sinking Fund Debentures (hereinafter referred to as the "New Debentures"), party of the second part;

WHEREAS, the Company on January 21, 1929 executed and delivered to the Trustee a separate instrument guaranteeing the due and punctual payment, in the manner provided in the Trust Agreement providing for the Old Debentures, of each and every Sinking Fund installment on the Old Debentures; and likewise endorsed on each Old

*Exhibits Received into Evidence.**Earl Exhibit B.*

Debenture a guarantee of the payment of principal thereof at maturity and of interest thereon; and

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WHEREAS, pursuant to the Plan of Reorganization for the G. A. F. Realty Corporation, confirmed by the United States District Court for the Southern District of New York in an order dated October 21, 1935 in proceedings under Section 77B of the Bankruptcy Act for the reorganization of a corporation, entitled "In the Matter of G. A. F. Realty Corporation, Debtor, No. 61331," the Company executed and delivered to the Trustee a Trust Agreement dated as of July 1, 1935, providing for the New Debentures which pursuant to the aforementioned Plan of Reorganization are to be exchangeable par for par for the Old Debentures; and

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WHEREAS, the aforementioned Plan of Reorganization and the aforementioned order of the United States District Court for the Southern District of New York approving the same provide that the Company pledge all of its right, title and interest in and to the Class B Common Stock, represented by Voting Trust Certificates, of Fuller Building Corporation received by it under said Plan of Reorganization as security for both Old and New Debentures;

NOW, THEREFORE, THIS AGREEMENT, WITNESSETH:

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That in consideration of the premises, the Company, for the purpose of securing the due and punctual payment of interest, sinking fund, and principal at maturity of the Old Debentures and for securing the performance of the Trust Agreement dated as of July 1, 1935, providing for

*Exhibits Received into Evidence.**Earl Exhibit B.*

150 the New Debentures, exchangeable par for par for the Old Debentures, hereby bargains, sells, conveys, transfers, assigns, pledges, sets over and delivers to the Trustee, its successor or successors in trust, all of its right, title and interest in 8,576 shares of Class B Common Stock of Fuller Building Corporation, represented by Class B Voting Trust Certificates issued under a Voting Trust Agreement dated as of January 31, 1936, executed between Fuller Building Corporation, stockholders thereof, and Richard Gordon Babbage, Samuel L. Fuller and Gerald Holsman, as Trustees, subject, however, to an Agreement, entitled the "Class B Common Stock Agreement," dated as of January 31, 1936, executed between the Company and Fuller Building Corporation pursuant to the Plan of Reorganization hereinabove mentioned, a certified copy of which Class B Common Stock Agreement has been filed with the Trustee.

151
152 TO HAVE AND TO HOLD THE SAME IN TRUST, NEVERTHELESS, subject to the provisions of the said Class B Common Stock Agreement for the cancellation of Class B Common Stock and Voting Trust Certificates representing such stock, to secure the performance by the Company of its Trust Agreement dated as of July 1, 1935, providing for the New Debentures; and of the guarantees by the Company of the payment of the sinking fund, interest, and principal at maturity of the Old Debentures issued under the Trust Agreement dated as of January 1, 1929, executed and delivered to The National City Bank of New York as Trustee by G. A. F. Realty Corporation and to be held subject to the reservations, terms and conditions in this Pledge Agreement expressly set forth and subject to which the said transfers and deliveries of said stock represented by said Voting Trust Certificates are made by the Company and accepted by the Trustee.

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*Exhibits Received into Evidence.**Earl Exhibit B.*

ARTICLE III

Cancellation of Class B Common Stock Pledged
Hereunder.

Section 1. In the event that Fuller Building Corporation fails to earn in each calendar year, commencing January 1, 1935, $2\frac{1}{2}\%$ interest on its Loan Certificates representing its First (Closed) Mortgage Loan due January 1, 1949 and New York City real estate taxes on the mortgaged premises therein described, the Class B Common Stock and/or Voting Trust Certificates pledged hereunder are subject to cancellation without compensation to the holder thereof all as provided in and pursuant to the Class B Common Stock Agreement hereinabove mentioned. In the event that Class B Common Stock of Fuller Building Corporation and/or Voting Trust Certificates pledged hereunder are cancelled pursuant to the Class B Common Stock Agreement hereinabove mentioned, the Company shall be under no obligation or liability whatsoever to supply further security under this Pledge Agreement which shall thereupon terminate.

Section 2. In the event, pursuant to the Class B Common Stock Agreement hereinabove mentioned, the Company, or the Company and Fuller Building Corporation jointly, deliver a written request or order to the Trustee to surrender the Class B Common Stock and/or Voting Trust Certificates pledged hereunder for cancellation, the Trustee covenants and agrees forthwith and without delay or question to surrender, and shall forthwith then so surrender, said Class B Common Stock and/or Voting Trust Certificates to Fuller Building Corporation or to the Voting Trustees, as the case may be, for cancellation.

*Exhibits Received into Evidence.**Earl Exhibit B.*

1156 Section 3. In the event that pursuant to Section 2 of this Article III the Trustee surrenders the Class B Common Stock and/or Voting Trust Certificates pledged hereunder to Fuller Building Corporation or to the Voting Trustees, as the case may be, for cancellation, the Trustee shall be relieved from any and all further liability with respect thereto, and Trustee shall be fully protected for so acting, and shall incur no liability for acting in accordance with the written request and order specified in the preceding Section 2 hereof.

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*Exhibits Received into Evidence.***Earl Exhibit D.**

[as abridged by stipulation dated September 13, 1939].

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

and

FULLER BUILDING CORPORATION**CLASS B COMMON STOCK AGREEMENT**

Dated as of January 31, 1936

AGREEMENT, dated as of January 31, 1936, between UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as "U. S. Realty"), party of the first part, and FULLER BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New York (hereinafter referred to as the "Company"), party of the second part;

WHEREAS, the Company was organized pursuant to a Plan of Reorganization adopted and confirmed by an order of the United States District Court for the Southern District of New York, dated October 24, 1935, in proceedings under Section 77B of the Bankruptcy Act for the reorganization of a corporation entitled "In the Matter of G. A. F. Realty Corporation, Debtor, No. 61331";

WHEREAS, pursuant to said Plan and said order the Company is to issue all of its authorized capital stock, including its entire issue of Class B Common Stock (8576 shares) to U. S. Realty, subject for ten years to a Voting

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*Exhibits Received into Evidence.**Earl Exhibit D.*

62 Trust Agreement and upon certain terms and conditions contained in the aforesaid Plan and to be contained in this Agreement (sometimes referred to as the "Class B Common Stock Agreement"); and

63 WHEREAS, the Company is now the owner in fee of the premises situated in the Borough of Manhattan, City, County and State of New York, on the northeast corner of 57th Street & Madison Avenue, hereinafter referred to as the "mortgaged premises," and more fully described in the Amended Indenture dated as of January 31, 1936, between the Company and The National City Bank of New York, as Trustee, hereinafter referred to as the First (Closed) Mortgage Loan;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That, in consideration of the premises and the covenants contained herein, IT IS MUTUALLY COVENANTED AND AGREED:

64 1. The Company will issue and U. S. Realty will accept said Class B Common Stock (or Class B Voting Trust Certificates, if any,), subject to the following terms and conditions:

(a) In the event that New York City real estate taxes on the premises subject to the lien of the First (Closed) Mortgage Loan of G. A. F. Realty Corporation assumed, as modified pursuant to the Plan of Reorganization hereinabove mentioned, by the Company and interest on said mortgage at the rate of $2\frac{1}{2}\%$ per annum commencing January 1, 1935,

*Exhibits Received into Evidence.**Earl Exhibit D.*

are not paid in full in any calendar year within fifteen days (15) after said real estate taxes or interest become due, the Company, at the discretion of its Board of Directors, shall be entitled to request and to obtain (at any time thereafter prior to the first day of July of the calendar year next following the calendar year in which payment was not made) the surrender for cancellation without compensation of the Class B Common Stock or Class B Voting Trust Certificates, if any, of the Company, provided, however, that in the event a sum equal to the aggregate of the aforesaid real estate taxes and $2\frac{1}{2}\%$ interest is in any calendar year earned but not paid by the Company (such earnings to be determined as hereinafter specified), the Company shall not by reason of such non-payment of taxes or interest in such calendar year be entitled to request and to obtain the surrender for cancellation without compensation of said Class B Common Stock or Class B Voting Trust Certificates, if any; and provided further, that in the event that there shall be a deficiency in any calendar year with respect to said real estate taxes and $2\frac{1}{2}\%$ interest, U. S. Realty or its successors or assigns or the then registered holders of said Class B Common Stock or Class B Voting Trust Certificates, if any, shall have the right to cure such deficiency by promptly donating to the Company the entire amount of such deficiency in cash and thereupon the Company shall not be entitled to obtain the surrender of said Class B Common Stock or Voting Trust Certificates, if any, for the failure of the Company to pay such taxes or interest in such calendar year.

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*Exhibits Received into Evidence.**Earl Exhibit D.*

IV. So long as said Class B Common Stock (and Voting Trust Certificates, if any,) shall be pledged with a trustee for the benefit of holders of Debentures, (both Debentures issued under a Trust Agreement executed by G. A. F. Realty Corporation to The National City Bank of New York as Trustee, dated as of January 1, 1929, and Debentures issued under a Trust Agreement executed by U. S. Realty to The National City Bank of New York, as Trustee, dated as of July 1, 1935), and so long as, pursuant to the provisions of this Agreement, the Company shall be entitled to the surrender of Class B Common Stock (and Voting Trust Certificates, if any) for cancellation and extinguishment, U.S.Realty will promptly execute, acknowledge and deliver, upon written request of the company, individually or jointly with the Company, orders and instructions to such pledgee of the Class B Common Stock (and Voting Trust Certificates, if any,) for the surrender by such pledgee of such stock (and Voting Trust Certificates, if any) to the Company, and will execute such other documents and instruments as the Company may reasonably require to evidence the cancellation and termination of all the right, title and interest of U. S. Realty in and to said Class B Common Stock (and Voting Trust Certificates, if any,). So long as the pledge for the benefit of holders of Debentures continues, and so long as the Pledge Agreement shall require the trustee-pledgee to surrender said Class B Common Stock (and Voting Trust Certificates, if any,) in compliance with a request and demand made either by U. S. Realty alone or by U. S. Realty and the Company jointly, U. S. Realty shall not be under any obligation to surrender phys-

*Exhibits Received into Evidence.**Earl Exhibit D.*

ically said Class B Common Stock (and Voting Trust Certificates, if any,) in the event that the Company be entitled, pursuant to the provisions of this Agreement, to a surrender and cancellation thereof.

1171

V. If said Class B Common Stock (and Class B Voting Trust Certificates, if any) are not pledged as security for the Debentures above mentioned, U. S. Realty, so long as it shall have any direct or indirect right, title, or interest in said Class B Common Stock (and Class B Voting Trust Certificates, if any) shall at all times be under the obligation to cause said Class B Common Stock (and Voting Trust Certificates, if any) to be surrendered physically in the event that the Company is entitled to a surrender thereof for cancellation and extinguishment pursuant to the provisions of this Agreement.

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* * * * *

[Earl Exhibits A and C have been omitted pursuant to stipulation].

1173

**Notice of Appeal by Securities and Exchange
Commission, Dated August 3, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

174

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor
SECURITIES AND EXCHANGE
COMMISSION,
Intervenor.

In Proceedings For
An Arrangement;
Index No. 74023

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, intervenor herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the following orders of the United States District Court for the Southern District of New York, made by United States District Judge Vincent L. Leibell and entered in this proceeding on July 28, 1939, and appeals from each and every part of the said orders as well as from the whole thereof:

(1) The order denying in all respects the motions of the Securities and Exchange Commission (a) to vacate the order finding the Debtor's petition to have been properly filed under Section 322 of the Bankruptcy Act, (b) to dismiss the Debtor's petition, (c) to deny confirmation of the Debtor's proposed arrangement, and (d) to dismiss this proceeding; and

Notice of Appeal by Securities and Exchange Commission, Dated August 3, 1939.

(2) The order referring this proceeding to Hon. John E. Joyce, Referee in Bankruptcy of the United States District Court for the Southern District of New York.

1177

Dated, New York, N. Y., August 3rd, 1939.

EDMUND BURKE, JR.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch;

Attorneys for the Securities
and Exchange Commission,

120 Broadway,

New York, N. Y.

1178

[Original Filed on August 3, 1939.]

1179

**Notice of Appeal by Debtor, Dated
August 7, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of
**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**
Debtor
**SECURITIES AND EXCHANGE
COMMISSION,**
Intervenor.

In Proceedings For
An Arrangement
No. 74023

Notice is hereby given that the United States Realty and Improvement Company, the debtor herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of United States District Judge Vincent L. Leibell dated July 28, 1939, filed in the office of the Clerk of this Court on July 28, 1939, granting the motion of Securities and Exchange Commission to intervene herein, and from each and every part of said order.

Dated: August 7, 1939.

Yours, etc.,

WHITE & CASE,
By Joseph M. Hartfield
Attorney for Debtor
14 Wall Street,
New York City, N. Y.

[Original Filed on August 8, 1939.]

Debtor's Bond for Costs on Appeal.

NATIONAL SURETY CORPORATION
NEW YORK

No. 5188116

1183

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
IN THE SECOND CIRCUIT

In the Matter of

UNITED STATES REALTY AND
 IMPROVEMENT COMPANY,

Debtor.

In Proceedings For
 An Arrangement
 No. 74023

1184

UNDERTAKING FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a New York Corporation, having an office and place of business at No. 110 John Street, in the City, County and State of New York, is held and firmly bound unto the Securities and Exchange Commission, in the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, to be paid to the said Securities and Exchange Commission, for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

1185

WHEREAS, on the 28th day of July, 1939, an order was entered in the above entitled proceeding;

AND the appellant, United States Realty and Improvement Company, feeling aggrieved thereby, appeals to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Debtor's Bond for Costs on Appeal.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the aforesaid order is affirmed or modified by the appellate court or if the appeal is dismissed, the appellant, United States Realty and Improvement Company, will pay all costs which may be awarded against it on said appeal.

DATED, New York, this 17th day of August, 1939.

NATIONAL SURETY CORPORATION

By A. B. Cataldo

Attorney-in-Fact.

And N. V. Tynan

Attorney-in-Fact.

STATE OF NEW YORK }
COUNTY OF NEW YORK. } ss.:

On this 17th day of August, 1939, before me personally appeared A. B. Cataldo, Attorney-in-Fact of the National Surety Corporation, with whom I am personally acquainted, and who, being by me duly sworn, says that he resides in Brooklyn, N. Y.; that he is the Attorney-in-Fact of the National Surety Corporation, the corporation described in and which executed the within instrument; that he knows the corporate seal of such Corporation; and that the seal affixed to the within instrument is such corporate seal and that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as Attorney-in-Fact of the said Corporation by like order. And said Attorney-in-Fact further stated that he is acquainted with N. V. Tynan, and knows him to be Attorney-in-Fact of said Corporation; that the signature of the said N. V. Tynan, subscribed

Debtor's Bond for Costs on Appeal.

to the said instrument is in the genuine handwriting of the said N. V. Tynan, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended, issued to the National Surety Corporation his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked.

1189

M. E. GEARITY

Notary Public for Kings Co.

Clk. No. 577, Reg. No. 1163

1190

Certificate filed in N. Y. Co.

No. 279, Reg. No. 1-G-163

Commission expires March 30, 1941.

COPY OF RESOLUTION

At a regular meeting of the Executive Committee of the National Surety Corporation, held at its offices in the City of New York, State of New York, on the 18th day of April, 1939, the following Resolution was unanimously adopted:

"RESOLVED, Albert L. Carr, A. B. Cataldo, P. L. Crafts, Vincent Cullen, P. R. Cummings, Joseph Donohue, Mildred Fackner, Harry A. Kearney, A. H. Kraus, R. MacLean, J. C. Murphy, Helen Petersen, O. C. Storbeck, J. H. Taylor, Wm. Twamley, A. P. Valenti, M. A. Verdrose, Edward W. Warnke, A. H. Wise and S. M. R. Wrightson, hereby designated the FIRST GROUP; and Harold Carr, M. E. Gearity, M. C.

1191

Debtor's Bond for Costs on Appeal.

92 Maloney, Katherine McFadden, Justin McGrath, Daniel Monaghan, A. Parlato, Joan C. Powell, Ellen Quinn, E. Rosasco, Marion Spiller and N. V. Tynan, hereby designated the SECOND GROUP, be and each of them is hereby appointed an Attorney-in-Fact of this Corporation and empowered to sign, seal, execute, acknowledge and deliver in its name, place and stead, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; but the Corporation shall be bound on any such instrument only when signed by two of the persons named in the First Group, or by one of those named in the First Group and by one of those named in the Second Group, and when any such instrument is so signed, and sealed with the seal of the Corporation, it shall bind the Corporation as fully and to the same extent as if it were signed by the President of the Corporation, sealed with its seal and attested by its Secretary, the Corporation hereby ratifying and confirming all the acts of said Attorneys-in-Fact done pursuant to the power and authority herein given.

93
STATE OF NEW YORK }
COUNTY OF NEW YORK. } ss.:

94 Joseph Donahue, being duly sworn, says that he is an Assistant Secretary of the National Surety Corporation; that he has compared the foregoing copy of Resolution with the original thereof, as recorded in the Minute Book of the said Corporation, and does hereby certify that the same is a true and correct transcript of the whole of the said original Resolution, that the same has not been revoked since its adoption, and that the parties who signed the attached instrument are

Debtor's Bond for Costs on Appeal.

still Attorneys-in-Fact of the National Surety Corporation.

Subscribed and sworn to before me this
17th day of August, 1939.

1295

Joseph Donahue,
Assistant Secretary

M. E. GEARITY

Notary Public for Kings Co.

Clt. No. 577, Reg. No. 1163

Certificate filed in N. Y. Co.

No. 279, Reg. No. 1-G-163

Commission expires March 30, 1941

1296

1297

**Stipulation Consolidating Records
on Appeal.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**

Debtor.

In Proceedings For
An Arrangement
No. 74023

It is hereby stipulated and agreed by and between the attorneys for the undersigned parties to this proceeding, with respect to the appeal taken by the Securities and Exchange Commission to the Circuit Court of Appeals for the Second Circuit by Notice of Appeal dated August 3, 1939 from two orders made and entered by this Court on July 28, 1939, and the appeal taken by the debtor by Notice of Appeal dated August 7, 1939 from an order made and entered by this Court on July 28, 1939, that the Records on Appeal be consolidated.

Dated, New York, September 6, 1939.

White & Case,
Attorneys for Debtor.

J. Anthony Panuch,
Attorney for Securities and
Exchange Commission.

Davis, Polk, Wardwell, Gardiner & Reed,
Attorneys for Guaranty Trust
Company of New York.

Stipulation Consolidating Records on Appeal.

Simpson, Thacher & Bartlett,
Attorneys for Beha Committee.

Ralph Montgomery Arkush,
Attorney for Grimm Committee.

1201

William Evans Bardusch,
Attorney for Ralph W. Earl
and Donald M. Halsted.

I. Newton Brozan,
Attorney for Grace Kreusser
and Harriet Mnuchin.

So Ordered

Augustus N. Hand
U. S. C. J.

1202

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Stipulation as to Contents of Record.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings For An Arrangement
No. 74023**

[SAME TITLE]

It is hereby stipulated by and between the undersigned parties to this proceeding that the following parts of the record, proceedings, and evidence be included in the consolidated record on appeal with respect to the appeals taken to the United States Circuit Court of Appeals for the Second Circuit by the Securities and Exchange Commission by Notice of Appeal dated August 3, 1939, from two orders of this Court made and entered on July 28, 1939, and by the Debtor by Notice of Appeal dated August 7, 1939, from an order of this Court made and entered on July 28, 1939:

1. Debtor's Petition for Arrangement, filed May 31, 1939, including the following exhibits attached thereto:

- (a) Exhibit A (pp. 14; 15; 17, except last 2 lines; 20, except first 4 lines; 21; 22, first 10 lines; 25, last 2 lines; 26; 27; 28; 29; 30; 31, first 4 lines; 36; 37; 38).
- (b) Exhibit B.
- (c) Exhibit C (omitting reverse side of form).
- (d) Exhibits D and E.
- (e) Exhibit G.
- (f) Exhibit H.

2. Order of Judge Vincent L. Leibell, approving Debtor's Petition for Arrangement, dated May 31, 1939.

Stipulation as to Contents of Record.

3. Memorandum and outline of Securities and Exchange Commission, dated July 5, 1939.

4. (a) Order to show cause re intervention by Securities and Exchange Commission, made by Judge Vincent L. Leibell and dated July 18, 1939. 1207

(b) Motion of Securities and Exchange Commission for leave to intervene, verified July 18, 1939.

(c) Answer of Debtor to motion of Securities and Exchange Commission for leave to intervene, verified July 20, 1939.

(d) Order of Judge Vincent L. Leibell granting motion of Securities and Exchange Commission for leave to intervene, dated July 28, 1939. 1208

5. (a) Order to show cause re motions of Securities and Exchange Commission to dismiss petition and proceedings, made by Judge Vincent L. Leibell and dated July 18, 1939.

(b) Motions of Securities and Exchange Commission to dismiss petition and proceedings.

(c) Answer of Debtor to motion of Securities and Exchange Commission to dismiss petition and proceedings, dated July 20, 1939.

(d) Order of Judge Vincent L. Leibell denying motions of Securities and Exchange Commission to dismiss petition and proceedings, dated July 28, 1939. 1209

6. Order of Judge Vincent L. Leibell referring proceeding to Referee, dated July 28, 1939.

7. The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on June 28, 1939:

Stipulation as to Contents of Record.

Page	1, line	1,	to	Page	3, line	12
"	14,	"	14,	"	20,	" 8
"	23,	"	18,	"	26,	" 18
"	32,	"	20,	"	38,	" 1
"	38,	"	13,	"	42,	" 2
"	46,	"	4,	"	46,	" 12
"	48,	"	3,	"	61,	" 24
"	64,	"	8,	"	64,	" 25

8 The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent-L. Leibell on July 7, 1939:

Page	69, line	1,	to	Page	75, line	17
"	96,	"	1,	"	"	3
"	100,	"	2,	"	101,	" 8
"	101,	"	18,	"	101,	" 19
"	102,	"	1,	"	145,	" 14
"	145,	"	18,	"	159,	" 20
"	161,	"	1,	"	181,	" 12
"	188,	"	9,	"	194,	" 19
"	195,	"	4,	"	197,	" 6; line 14
"	197,	"	24,	"	198,	" 6
"	198,	"	14,	"	198,	" 19
"	199,	"	15,	"	201,	" 12
"	203,	"	2,	"	215,	" 18
"	216,	"	5,	"	226,	" 15
"	226,	"	22,	"	230,	" 25
"	231,	"	4,	"	242,	" 22
"	244,	"	6,	"	244,	" 11
"	251,	"	15,	"	253,	" 6
"	255,	"	15,	"	255,	" 18

Stipulation as to Contents of Record.

9. The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 10, 1939:

1213

Page 261, line 1,	to	Page 262, line 14
" 275, " 10,	"	" 276, " 3
" 276, " 10,	"	" 280, " 11
" 281, " 5,	"	" 285, " 25
" 287, " 4,	"	" 287, " 17
" 287, " 23,	"	" 289, " 11
" 292, " 18,	"	" 293, " 16

10. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939:

1214

Page 294, line 1,	to	Page 296, line 22
" 297, " 8,	"	" 304, " 25
" 337, " 7,	"	" 338, " 9
" 340, " 5,	"	" 351, " 21
" 352, " 12,	"	" 353, " 5
" 354, " 25,	"	" 356, " 7

11. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 27, 1939:

1215

Page 387, line 1,	to	Page 388, line 12
" 388, " 20,	"	" 394, " 17
" 394, " 24,	"	" 395, " 18
" 395, " 20,	"	" 430, " 21

12. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 28, 1939:

Stipulation as to Contents of Record.

Page 432, line 1, to Page 434, line 10
 438, " 8, " " 442A, " 3

12 13 The following exhibits received in evidence at the meeting of creditors before Judge Leibell:

- a. Debtor's Exhibit 1
- (b) Debtor's Exhibit 2
- (c) Debtor's Exhibit 3
- (d) Debtor's Exhibit 4
- (e) Debtor's Exhibit 6
- (f) Debtor's Exhibit 10
- (g) Earl Exhibit B (pp. 1; 2; 3, first 5 lines; 7, beginning with Article III; 8, ending with Article III.)
- (h) Earl Exhibit D (pp. 1; 2, except last 2 lines; 8, beginning with Paragraph IV; 9, ending with Paragraph V.)

1217 14 Notice of appeal by Securities and Exchange Commission, dated August 3, 1939.

15 Notice of appeal by Debtor, dated August 7, 1939.

16 Debtor's bond for costs of appeal.

1218 17 Stipulation consolidating records on appeal.

18 Stipulation as to contents of record.

19 Stipulation as to transcript of record.

20 Clerk's certificate as to transcript of record.

Stipulation as to Contents of Record.

It is further stipulated and agreed that when the foregoing parts of the record, proceedings, and evidences are printed, except as hereinafter provided, the undersigned parties will stipulate that the same is a true transcript of the record of the District Court with respect to said appeals, without prejudice to the reservation of rights hereinafter referred to.

1219

It is further understood that the Securities and Exchange Commission and the Debtor are not in agreement as to the inclusion of certain parts of the proceedings, papers, and evidence which have been included in the consolidated record on appeal, and each of said parties reserves all its right under Federal Rule of Civil Procedure 75(e) with respect to portions of the consolidated record on appeal which the said parties respectively believe should not have been included pursuant to said Rule 75(e), as follows:

1220

1. The Securities and Exchange Commission states that the following should not have been included in the consolidated record on appeal:

(a) Memorandum and outline of Securities and Exchange Commission dated July 5, 1939.

(b) The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 7, 1939: p. 253, line 1, to p. 253, line 6; p. 255, line 15, to p. 255, line 18.

1221

(c) The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939:

Stipulation as to Contents of Record.

Page 294, line 1, • to	Page 296, line 22
" 297, " 8, "	" 304, " 25
" 337, " 7, "	" 338, " 9
" 340, " 5, "	" 351, " 21
" 352, " 12, "	" 353, " 5
" 354, " 25, "	" 356, " 7

2. The Debtor states that the following should not have been included in the consolidated record on appeal:

- (a) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on June 28, 1939, except the following: p. 41 line 1, to p. 3, line 3.
- (b) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 7, 1939, except the following: p. 69, line 1, to p. 70; p. 74, line 5, to p. 75 line 1.
- (c) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 10, 1939, except the following: p. 261, line 1, to p. 262, line 14; p. 281, line 5, to p. 282, line 8.
- (d) All of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939, except the following: pp. 294 to 296; 298 to 299; 337 to 338; 345 to 351.
- (e) All of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 27, 1939, except the following:

Stipulation as to Contents of Record.

Page 387, line 1, to Page 388, line 12
 " 393, " 20, " " 394, " 17
 " 396, " 11, " " 397, " 7
 " 425, " 14, " " 428, " 12

1225

(f) All of the exhibits received in evidence at the meeting of creditors before Judge Leibell.

It is further stipulated and agreed that Debtor's Exhibit 10, consisting of nine annual reports to stockholders, shall not be printed but shall be deemed to be part of the consolidated record on appeal; and that any of the parties to the appeal may refer to said exhibit, or any portion thereof, in which event three copies of the said exhibit or said portion thereof shall be made available by the Debtor for the use of the appellate court.

1226

Dated New York, N. Y., September 13, 1939.

White & Case,
 Attorneys for Debtor:

J. Anthony Panuch,
 Attorney for Securities and
 Exchange Commission.

Davis, Polk, Wardwell, Gardiner & Reed,
 Attorneys for Guaranty Trust
 Company of New York.

Simpson, Thacher & Bartlett,
 Attorneys for Beha Committee.

1227

Ralph Montgomery Arkush,
 Attorney for Grimm Committee.

I. Newton Brozan,
 Attorney for Grace Kreusser
 and Harriet Mnuchin.

William Evans Bardusch,
 Attorney for Ralph W. Earl
 and Donald M. Halsted.

Stipulation,

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor**

In Proceedings For
An Arrangement
No. 74023

It is hereby stipulated and agreed that the foregoing is a true transcript of the record in the District Court,

Dated, New York, N. Y., October , 1939.

WHITE & CASE,
Attorneys for Debtor.

J. ANTHONY PANUCH,
Attorney for Securities and Exchange
Commission.

**DAVIS, POLK, WARDWELL,
GARDINER & REED,**
Attorneys for Guaranty Trust Company
of New York.

SIMPSON, THACHER & BARTLETT,
Attorneys for Beha Committee.

RALPH MONTGOMERY ARK
Attorney for Grimm Committee.

WILLIAM E. BARDUSCH,
Attorney for Ralph W. Earl and
Donald M. Halsted.

I. NEWTON BROZAN,

Clerk's Certificate.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

1231

In the Matter of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor

In Proceedings For
An Arrangement
No. 74023

I, George J. H. Follmer Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

1232

In Testimony whereof, I have caused the seal of the said District Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of October in the year of our Lord one thousand nine hundred and thirty-nine, and of the independence of the said United States the one hundred and sixty-third.

GEORGE J. H. FOLLMER.
Clerk.

1233

(SEAL)

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, AND UNITED
STATES REALTY AND IMPROVEMENT COMPANY, APPELLEE

In Proceedings for an Arrangement under Chapter XI of
the Bankruptcy Act

SIRS: Please take notice that United States Realty and Improvement Company will move upon the annexed Petition to Dismiss the Appeals of the Securities and Exchange Commission from two orders of the United States District Court for the Southern District of New York in the above-entitled action on November 6, 1939, at 10:30 o'clock A. M., in Room 1700 of the United States Court House, Foley Square, City, County, and State of New York.

Dated: New York, N. Y., November 1, 1939.

Yours, etc.,

WHITE & CASE,

*Attorneys for United States Realty and
Improvement Company, Debtor.*

14 Wall Street, New York, N. Y.

To:

Edmund Burke, Jr., Esq. and J. A. Panuch, Esq., Attorneys for Securities and Exchange Commission, 120 Broadway, New York, N. Y.

Messrs. Davis Polk Wardwell Gardiner and Reed, Attorneys for Guaranty Trust Company of New York, as Mortgagee, 15 Broad Street, New York, N. Y.

Messrs. Simpson, Thacher & Bartlett, Attorneys for Bela Committee, 120 Broadway, New York, N. Y.

Ralph Montgomery Arkush, Esq., Attorney for Grimm Committee, 15 Broad Street, New York, N. Y.

William Evans Bardusch, Esq., Attorney for Ralph W. Earl and Donald M. Halsted, 63 Wall Street, New York, N. Y.

Messrs. MacLanahan, Merritt and Ingraham, Attorneys for Institutional Certificateholders Committee.

United States Circuit Court of Appeals for the Second Circuit

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, AND UNITED STATES
REALTY AND IMPROVEMENT COMPANY, APPELLEE

In Proceedings for an Arrangement under Chapter XI of the
Bankruptcy Act

Petition of debtor to dismiss appeals

*To the Honorable the Judges of the United States Circuit Court of
Appeals for the Second Circuit:*

The petition of United States Realty and Improvement Company, Debtor herein, respectfully states:

1. The Debtor filed its Petition with the United States District Court for the Southern District of New York for an Arrangement under Chapter XI of the Bankruptcy Act on May 31, 1939. Said Court by an Order dated May 31, 1939, found inter alia in substance as follows: The Petition of the Debtor was properly filed under Section 322 of the Bankruptcy Act; United States Realty and Improvement Company was a debtor within the definition of Section 306 (3) of the Bankruptcy Act and the schedules annexed to said Petition were in full compliance with the provisions of the Bankruptcy Act. The Debtor was continued in possession until further order of the Court. Annexed to said Petition was a copy of an Arrangement proposed by the Debtor.

2. Thereafter on June 28, 1939, the first meeting of creditors in accordance with the act was held, which meeting was adjourned until July 7, 1939.

3. In the meantime in accordance with a memorandum dated July 5, 1939, and served on the Debtor by the Securities and Exchange Commission it appeared that representatives of the Commission had conferred with the Honorable Vincent L. Leibell, United States District Judge, and had obtained leave to appear in the proceeding as amicus curiae. Annexed to said memorandum was an "Outline of Matters to be Discussed by the Securities and Exchange Commission," stating in substance that it was the Commission's view that the Court was without jurisdiction under Chapter XI of the Bankruptcy Act and that the Order finding the Debtor's Petition properly filed should be vacated and that such Petition should be dismissed. Such views were alleged to be based in substance upon the following arguments: That the Debtor could not properly file a Petition under Chapter XI but would have to resort to Chapter X since the Debtor had securities outstanding in the hands of the public. On information and belief, the Securities and Exchange Commission has consistently failed to

recognize the essential difference in theory between an arrangement and a reorganization.

4. The Securities and Exchange Commission through its counsel participated as *amicus curiae* at the adjourned hearing on July 7, 1939, which hearing was adjourned to July 10, 1939.

5. The Securities and Exchange Commission again participated as *amicus curiae* at the hearing held on July 10, 1939, which hearing was adjourned to July 20, 1939, at which hearing the Securities and Exchange Commission again participated as *amicus curiae*. The District Court adjourned such hearing until July 27, 1939.

6. The District Court having indicated that it would not sustain the position which the Securities and Exchange Commission had maintained as *amicus curiae*, the Securities and Exchange Commission thereupon obtained two orders to show cause (1) why it should not be granted leave to intervene and (2) why the Petition of the Debtor should not be dismissed and the Order of May 31, 1939, finding the Petition properly filed should not be vacated.

7. Thereafter at a hearing held July 27, 1939, the District Court granted the Securities and Exchange Commission leave to intervene and made an Order to such effect on July 28, 1939. The District Court also denied the motion of the Securities and Exchange Commission to dismiss the proceedings, etc., and made an Order to such effect on the same date.

8. The District Court also by an Order dated July 28, 1939, referred the proceeding to a referee, to which Order the Securities and Exchange Commission took an exception.

9. The Securities and Exchange Commission by notice of appeal, dated August 3, 1939, appealed from two Orders of the District Court, dated July 28, 1939, the first being the one denying the motion of the Securities and Exchange Commission to dismiss, etc., and the second being the Order referring the proceedings to a referee. The Debtor by a notice of appeal dated August 8, 1939, appealed from the Order of the District Court dated July 29, 1939, granting leave to the Securities and Exchange Commission to intervene.

10. The consolidated record on appeal with respect to all of the foregoing three appeals will have been docketed and on file with this Court when this Petition is served and filed, and this Petition is based upon the matter contained in such record.

11. The Debtor is advised by counsel that the appeals of the Securities and Exchange Commission should be dismissed on the following grounds:

1. The Securities and Exchange Commission is a statutory body and has no authority, rights, powers, or duties except those conferred upon it by statute. There is no statute conferring upon it any authority, rights, powers, or duties in connection with a Chapter XI proceeding and its participation therein is *ultra vires*.

2. The right of appeal is a creature of statute and an appeal cannot be prosecuted without statutory authority. No statute grants the right to the Securities and Exchange Commission to appeal in this case.

3. The Securities and Exchange Commission is not a proper party to appeal since it has no real interest in the proceeding and since it is not aggrieved or adversely affected by either of the orders of which it complains.

4. The Securities and Exchange Commission is not a proper party to a Chapter XI proceeding and it was an error for the District Court to have permitted it to intervene. As an improper party it cannot appeal.

5. The Securities and Exchange Commission intervened in subordination to and in recognition of the proceeding and the jurisdiction of the court and therefore cannot attack such jurisdiction or appeal on any jurisdictional grounds. In addition, the Securities and Exchange Commission is estopped from making such attack or taking such appeal.

6. The Securities and Exchange Commission, as an intervenor, cannot seek to impeach a decree or order already made.

7. In any event, the Securities and Exchange Commission cannot appeal from the order referring the proceeding to a Referee since its intervention was expressly limited by the District Court to the jurisdictional ground and the original order in the proceeding.

12. Although the Debtor entered into a stipulation with the Securities and Exchange Commission with respect to the record on appeal the Debtor reserved its right to move this Court for costs against the Securities and Exchange Commission for causing such record to be excessive in length and to contain material which is entirely irrelevant and immaterial to its appeals in violation of the Rules of Civil Procedure.

13. No other application has been made for the relief herein requested.

Wherefore, the Debtor respectfully prays that the two aforesaid appeals of the Securities and Exchange Commission be summarily dismissed.

UNITED STATES REALTY AND IMPROVEMENT COMPANY.
By EDWIN J. BEINECKE, *President*.

Attest:

[SEAL]

F. M. SANDERS, *Secretary*.

STATE OF NEW YORK,

County of New York, ss:

Edwin J. Beinecke, being duly sworn, deposes and says, that he is an officer, to wit, President of United States Realty and Improvement Company, the Debtor in the above-entitled action; that the foregoing Petition is true of his own knowledge, except as to the matters therein

stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDWIN J. BEINECKE.

Sworn to before me this 16th day of October 1939.

[SEAL]

WALTER E. ECKERT,
Notary Public Kings County.

Kings Co. Clerk's No. 44, Reg. No. 148. Certificates filed in New York Co. Clerk's No. 120, Reg. No. 0-E-73. Commission expires March 30, 1940.

United States Circuit Court of Appeals for the Second Circuit

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, INTERVENER, APPELLANT,

v.

UNITED STATES REALTY AND IMPROVEMENT COMPANY,
DEBTOR, APPELLEE

*Answer of Securities and Exchange Commission to motion to
dismiss appeal*

*To the Honorable the Judges of the United States Circuit Court of
Appeals for the Second Circuit:*

The Answer of the Securities and Exchange Commission to the motion of United States Realty and Improvement Company, the Debtor, to dismiss an appeal taken by the Commission, respectfully states:

I

On May 31, 1939, the Debtor filed with the United States District Court for the Southern District of New York, a petition under Section 322 of the Bankruptcy Act of 1898, as amended, proposing an Arrangement under Chapter XI of that Act. Schedules attached to the petition stated that the Debtor had assets of \$23,378,988.90, liabilities of \$5,538,985.05, and contingent liabilities in excess of \$3,900,000. The Debtor has outstanding in the hands of the public four classes of securities, including \$2,339,000 of debentures, 900,000 shares of stock listed on the New York Stock Exchange, and a guarantee of \$3,710,500 of first mortgage certificates.

II

By order of the District Court, dated July 28, 1939, the Commission was permitted to intervene in this proceeding for the following purposes:

1. To move the District Court (a) to dismiss the Debtor's petition initiating the proceeding under Chapter XI, (b) to deny confirmation of the Arrangement proposed by the Debtor, and (c) to dismiss the proceeding under Chapter XI;

2. To take such other steps as may be appropriate to contest the jurisdiction of the District Court over the proceeding under Chapter XI; and

3. To enable the Commission to appeal from any order respecting its motions and other steps contesting the jurisdiction of the District Court.

III

By notice of appeal, dated August 3, 1939, the Commission, in its capacity as an intervener in this proceeding, appealed to this Court from two orders of the District Court entered on July 28, 1939. The first of these orders denied motions¹ of the Commission to dismiss the Debtor's petition and the proceeding. The motions were based on the ground that the District Court was without jurisdiction because the provisions of Chapter XI do not apply to a corporation, such as the Debtor, which has securities outstanding in the hands of the public, and that such a corporation is required to file under Chapter X if it desires to adjust its obligations under the provisions of the Bankruptcy Act.

The second order from which the Commission has appealed is an order referring the proceeding to a referee, entered over the objection of the Commission that continuation of the proceeding was improper because of the District Court's lack of jurisdiction.

IV

Subsequently, by notice of appeal dated August 7, 1939, the Debtor appealed to this Court from the order permitting the Commission to intervene in this proceeding. By stipulation of the parties dated September 6, 1939, approved by a judge of this Court, the Commission's appeal from the orders overruling its jurisdictional objections, and the Debtor's appeal from the intervention order, are before this Court on a single consolidated record, filed on November 1, 1939. Both appeals are awaiting hearing and determination by this Court.

V

The Commission filed in this Court on November 1, 1939, a brief supporting the appeal which it has taken. On the same day, the Debtor filed a brief in connection with its appeal from the order granting leave to the Commission to intervene. On November 10, 1939, the Commission filed an answering brief supporting the order of intervention.

¹ The Commission made four motions: (1) to dismiss the proceeding; (2) to dismiss the Debtor's petition; (3) to vacate the order of May 31, 1939; and (4) to deny confirmation of the Debtor's proposed arrangement.

VI

These appeals raise jurisdictional questions of first impression affecting the Debtor's security holders, the general investing public, and the Commission. The continuance of this proceeding will have the effect of denying to the investors in the Debtor the safeguards specially embodied in Chapter X of the Bankruptcy Act for their protection. It will also have a prejudicial and conclusive effect upon the Commission in preventing it from performing the duties prescribed by Congress in Chapter X of the Bankruptcy Act in connection with the reorganization of corporations having a public investor interest. The general investing public will likewise be adversely affected by the precedent established.

VII

The Commission has argued in its brief supporting the present appeal that the District Court should have dismissed the Debtor's petition and this proceeding for the reason that—

1. It was the intention of Congress that Chapter X, not Chapter XI, should be the mechanism for readjusting the obligations of corporations whose securities are held by the public. That intention is demonstrated by the legislative history of the two chapters and by their content and internal structure.

2. It was the duty of the District Court to construe the statute to effectuate the Congressional intention.

3. The facts of this case (as contained in the consolidated record on appeal which has been made a part of the present motion) demonstrate that corporations with securities held by the public cannot be properly reorganized under Chapter XI.

VIII

The Commission denies that it is without standing to take this appeal or that its intervention was improper. The Commission represents that by reason of its intervention and its interests in the jurisdictional issues presented by this proceeding, it properly appealed to this Court from the adverse determinations of the District Court.

Wherefore, the Securities and Exchange Commission respectfully prays that the Debtor's motion to dismiss this appeal be denied.

SECURITIES AND EXCHANGE COMMISSION,
 (Sgd.) EDMUND BURKE, JR.
 Edmund Burke, Jr.
 (Sgd.) J. ANTHONY PANUCH.
 J. Anthony Panuch.

STATE OF NEW YORK,

County of New York, ss:

J. Anthony Panuch, being duly sworn, deposes and says:

That he is Special Counsel to the Reorganization Division of the Securities and Exchange Commission; that the Securities and Exchange Commission has authorized and directed the filing of the within Answer.

That he has read the foregoing Answer and knows the contents thereof; that the same is true of his knowledge, except as to those matters stated therein to be alleged upon information and belief, and that as to those matters he believes them to be true.

That the sources of deponent's information and the grounds of his belief stated in the within Answer to be alleged upon information and belief are records, documents, memoranda, reports, exhibits, and minutes of testimony in this proceeding and appeal.

(Sgd.) J. ANTHONY PANUCH.
J. Anthony Panuch.

Sworn to before me this 13th day of November 1939.

Notary Public.

United States Circuit Court of Appeals for the Second District

No. 178—October Term, 1939

(Argued December 6, 1939. Decided January 15, 1940)

IN THE MATTER OF UNITED STATES REALTY AND INVESTMENT COMPANY,
DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, *and* UNITED
STATES REALTY AND IMPROVEMENT COMPANY, APPELLEE

UNITED STATES REALTY AND IMPROVEMENT COMPANY, APPELLANT, *and*
SECURITIES AND EXCHANGE COMMISSION, APPELLEE

Appeals from the District Court of the United States for the Southern
District of New York

In proceedings for an arrangement under chapter XI of the Bankruptcy Act. The debtor has appealed from an order permitting Securities and Exchange Commission to intervene; the Commission has appealed from an order denying its motion to dismiss the proceeding for lack of jurisdiction and also from an order referring the proceeding to a referee in bankruptcy. The three appeals were consolidated and heard upon a single record. The debtor has moved to dismiss the appeals taken by the Commission. Motion granted; order of intervention reversed.

Before SWAN, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

WHITE & CASE, Attorneys for the Debtor; **Joseph M. Harfield**, **Joseph A. Bennett**, **Henry M. Marx**, and **Charles W. Dibbell**, of Counsel. **CHESTER T. LANE**, General Counsel, and **MARTIN RIGER**, **SAMUEL H. LEVY**, **RAOUL BERGER**, **GEORGE ZOLOTAR**, and **HOMER KRIPKE**, Attorneys for Securities and Exchange Commission; **J. Anthony Panuch**, of Counsel.

SWAN, Circuit Judge: This is a proceeding for an arrangement under chapter XI of the Bankruptcy Act. It was commenced by petition filed by United States Realty and Improvement Company, hereafter called the debtor. The debtor is a New Jersey corporation having its principal place of business within the city of New York; its business consists in the management and ownership of investments in real estate. It has substantial assets and liabilities and its capital stock and certain other securities are outstanding in the hands of the public. By this proceeding it seeks to obtain an extension and modification of one class of its unsecured obligations, namely, its guaranty of the publicly held mortgage certificates, in the amount of some \$3,700,000, of its subsidiary, Trinity Buildings Corporation of New York (for brevity hereafter called Trinity); all other unsecured obligations the debtor proposes to pay as they fall due. The mortgage against which the guaranteed certificates were issued was to mature June 1, 1939, and the debtor's plan contemplates that the mortgagor, Trinity, will institute a proceeding under the Burchill Act (sections 121-3, N. Y. Real Property Law) in a state court to obtain a modification of the mortgage to conform it to the debtor's guaranty as modified under the arrangement.

By order entered on May 31, 1939, the date of the filing of the debtor's petition, the district court found, among other things, that the petition was properly filed under section 322 of the Act, 11 U. S. C. A. § 722, and directed that the debtor be continued in possession of its assets and that a meeting of its creditors be convened before the court on June 28, 1939. Early in July counsel for the Securities and Exchange Commission obtained permission from the district judge to present as *amicus curiae* the contention that the order of May 31st should be vacated and the proceeding dismissed for lack of jurisdiction. As *amicus curiae*, counsel for the Commission pressed the argument at several hearings that the debtor could not properly file a petition for an arrangement under chapter XI but must resort to a reorganization under chapter X because it had securities outstanding in the hands of the public. After the judge had indicated that this contention would not be sustained, the Commission moved for leave to intervene in the proceeding for the purpose of moving to vacate the order of May 31st, to deny confirmation of the debtor's proposed arrangement and to dismiss the proceeding. After further argument the court, on July 28, 1939, entered three orders. The first granted the Commission leave to intervene for the purpose of contesting jurisdiction of the court over this proceeding under chapter XI, "and for the purpose of enabling the said Commission to appeal from any order made in this proceed-

ing with respect thereto"; the second denied the motions of the Commission to vacate the order finding the debtor's petition to have been properly filed under section 322 and to dismiss the proceeding for lack of jurisdiction; and the third referred the proceeding to one of the referees in bankruptcy for such action as is required and permitted by the Bankruptcy Act. From the two latter orders the Commission appealed; subsequently the debtor appealed from the order allowing intervention. Thereafter the debtor moved in this court to dismiss the Commission's appeals. This motion was reserved until argument of the appeals.

These appeals raise interesting questions as to the interrelations of chapters X and XI of the Chandler Act and as to the right of the securities and Exchange Commission to intervene in an arrangement proceeding under chapter XI. If it be assumed that the Commission is properly here as an appellant, a majority of the court is of opinion that the orders from which it has appealed are right. The Commission attacks the jurisdiction of the court upon the theory that where a corporation seeks to effect an arrangement with respect to unsecured debts which are held by the investing public, as are the guaranteed certificates representing shares in Trinity's mortgage, it must proceed under chapter X and the court lacks jurisdiction to entertain a proceeding under chapter XI. However desirable such a limitation of the scope of an "arrangement" proceeding might be thought to be, we can find no warrant for it in the words of the statute or the history of the legislation.² Subdivision 1 of section 306 provides that "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms; and subdivision 3 defines debtor to mean a person who could become a bankrupt under section 4 of this Act and who files a petition under this chapter. The debtor is a person who could become a bankrupt under section 4. Concededly, therefore, the literal words of the statute authorize this proceeding. It may well be that the framers of the legislation contemplated that the arrangement procedure of chapter XI would be more likely to be availed of by small corporations and the reorganization procedure of chapter X by large corporations³; but no such limitation was written into the statute. Nor do we see any compelling reason for saying that a "large" corporation cannot obtain adequate relief under chapter XI because of the existence of outstanding securities in the investing public. Indeed, the statute seems to give preference to an arrangement proceeding, for it is provided in section 130 (7) that a petition under chapter 10 must state "the specific facts showing

² This question has been much discussed in periodical articles. See *Competing Systems of Reorganization*, 48 Yale L. J. 1334, and articles therein cited; *The Need for Amendment of the Chandler Act*, *Am. Bankruptcy Rev.*, Vol. A 3, p. 35; Oct. 1939.

³ The report of the Judiciary Committee to the House with respect to H. R. 8046 stated with respect to chapter XI, which combines features of sections 12 and 74: "The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12." House Report, 75th Cong., 1st sess., pp. 50-51.

need for relief under this chapter and why adequate relief can be obtained under chapter XI of this Act." See also §§ 146, 147. The latter section provides that a petition for reorganization improperly filed because adequate relief can be obtained by the debtor under chapter XI may be amended to comply with the requirements thereof and thereafter be deemed to have been originally filed thereunder. No corresponding provision is found in chapter XI. There, section 376 (2) provides for adjudication of bankruptcy or dismissal of the proceeding if confirmation of the arrangement is refused. Accordingly, we find nothing in the statute to justify acceptance of the contention that the court lacked jurisdiction to entertain this proceeding. To read into chapter XI the limitation that it may be invoked only by small corporations without publicly held securities requires legislation rather than judicial interpretation. Whether the proposed arrangement meets the requirements necessary for confirmation (section 366) is a matter unrelated to jurisdiction and one on which the district court will later have to pass when the issue of confirmation is presented. We express no opinion concerning it at the present time.

We pass now to the right of the Commission to intervene in a chapter XI proceeding. No section of that chapter confers such a right. Section 208, however, expressly authorizes intervention by the Commission in a chapter X proceeding upon request of the debtor or upon its own motion if approved by the judge, but forbids appeal from any order entered in such a proceeding. The inclusion in chapter X of express permission to intervene and the omission of such a provision in chapter XI raises a strong implication against intervention by the Commission in the latter type of proceeding. In an arrangement proceeding the Commission has no special duties to perform such as are provided in section 172. The Commission argues that in order to protect its right to intervene in a chapter X proceeding it must be allowed to intervene in any chapter XI proceeding which it believes ought properly to have been brought under chapter X. But this proceeds upon the false premise that the Commission has a present right to protect. It has no such right. Its only right is to intervene if a chapter X proceeding is instituted. Until such a proceeding is instituted, the Commission has no interest whatever to protect. It cannot require a chapter X proceeding to be instituted, if the present chapter XI proceeding be maintained. Dismissal of the present proceeding would not necessarily result in a chapter X proceeding by either the debtor or its creditors; neither it nor they are compelled to initiate any court proceeding, and if one were initiated it might be in straight bankruptcy rather than in reorganization. The case at bar is not like those of *Pennsylvania v. Williams*, 294 U. S. 176, and *Gordon v. Ominsky*, 294 U. S. 186, in each of which the intervening representative of the Commonwealth of Pennsylvania claimed a right to the full possession and control of the assets of the insolvents, not merely a right

to advise or to protect the public interest. The Commission has no special interest to protect by intervention in the proceeding at bar.

Nor will its general interest in the welfare of holders of Trinity's mortgage certificates guaranteed by the debtor serve as a legitimate ground for intervention. A governmental agency has no general right of intervention "in the public interest." 2 Moore's Fed. Prac., p. 2327. We find nothing in Rule 24 of the Federal Rules of Civil Procedure or in the authorities cited in the briefs that points to a different conclusion. In one group of cases relied upon to support a general right of intervention in the government, the government claimed ownership of the land involved—a direct pecuniary interest—*Stanley v. Schwalby*, 147 U. S. 508; *Percy Summer Club v. Astle*, 110 F. 486 (C. C. N. H.); *Winola Lake and Land Co., Inc. v. Gorham*, 17 F. Supp. 75 (M. D. Pa.); or held title to the land in question as trustee for the Indians. *Brewer Oil Co. v. United States*, 260 U. S. 77; *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (C. C. A. 9). There was also a direct pecuniary interest in the cases in which the Commissioner of Internal Revenue was allowed to intervene in stockholder suits to enjoin the payment of taxes on the ground of the unconstitutionality of the taxing statute. *Helyering v. Davis*, 301 U. S. 619; *Davis v. Boston and M. R. R. Co.*, 89 F. (2) 368 (C. C. A. 1); *Norman v. Consolidated Edison Co. of New York*, 89 F. (2d) 619 (C. C. A. 2). In *New York v. New Jersey*, 256 U. S. 296, the United States intervened to protect its absolute control over navigable waters and its interest in adjacent public property which would be affected by the outcome of the suit. See p. 308. Nor does *Florida v. Georgia*, 17 How. 478, support the Commission's views. There the only question was whether the fact that the suit was between two states forbade intervention. See p. 492. In the *Exchange*, 7 Cranch 116, the United States never attempted to intervene as a party; it merely, through the United States attorney, filed a "suggestion," and was heard. The question of the United States attorney's right to appeal does not seem to have been raised. On the other hand, cases dealing generally with the right to intervene have demanded an interest in the result of the litigation of a direct and immediate character; the intervenor must stand to gain or lose directly by the decision of the court. See *Smith v. Gale*, 144 U. S. 509; *Lombard Inv. Co. v. Seaboard Mfg. Co.*, 74 F. 325, 326 (S. D. Ala.); *Glass v. Woodman*, 223 F. 621, 622 (C. C. A. 8); Moore's Federal Practice, pp. 2307 et seq. A somewhat analogous rule holds that one seeking review in the Supreme Court of a court judgment must have a personal as distinguished from an official interest in the relief sought, and in the federal right alleged to be denied. *Marshall v. Dye*, 231 U. S. 250, 257. The order permitting intervention brought up by the debtor's appeal should be reversed.

In considering at the outset the orders from which the Commission appealed we assumed for purposes of discussion that the Commission was properly an appellant. That assumption is challenged by the debtor's motion to dismiss. Had this proceeding been insti-

ated under chapter X and had the district judge decided that adequate relief could be obtained under a chapter XI proceeding and thereupon permitted an amendment of the petition and allowed the proceeding to continue as though originally filed thereunder, the Commission, though it had properly been allowed to intervene in the chapter X proceeding, could not have appealed from the order which determined that adequate relief could be obtained under a chapter XI proceeding. Section 208. That being so, it would be strange indeed if, after erroneously being allowed to intervene in the proceeding at bar, it could appeal from an order denying its motion to dismiss the proceeding. It would seem that the implication of section 208 not only forbids intervention in a chapter XI proceeding but also forbids appeal if intervention is erroneously permitted therein. But however that may be, we think the appeals should be dismissed because the Commission is not aggrieved by the orders appealed from; it has no interest that is affected by the litigation. In *Commercial Cable Staff's Association v. Lehman*, decided November 20, 1939, we held that intervention erroneously granted to an intervenor having no interest in reorganization litigation, gave it no right to appeal from orders approving the plan of reorganization. The motion to dismiss the Commission's appeals is granted. The order of intervention is reversed.

Before SWAN, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

CLARK, Circuit Judge (dissenting).

Chapter X was designed to insure the reorganization of large corporations with a maximum of safety for the investing public. Chapter XI was enacted to permit the rehabilitation of small commercial enterprises with a maximum of convenience for the oppressed debtor. Quite naturally, there are vast differences in both method and result between the procedures of the two chapters. Especially significant is the close judicial and administrative supervision over the activities of all persons specified by Chapter X, compared with the freedom of maneuver permissible under Chapter XI. I do not believe we are justified in opening a hole in the Chandler Act through which great corporations may escape from Chapter X. And I think it particularly unfortunate to do so by (as it seems to me) disregarding the interrelation of these two chapters, when read together in the light of their purpose, for a literal and mechanical interpretation of section or two of the Act specifying who may be bankrupts. I believe that X and XI are mutually exclusive, that a corporation which is amenable to one is not amenable to the other, and that the proper place for the United States Realty and Improvement Company is in a X proceeding. If this much be so, it was the duty of

A dissent ought to be brief, and therefore and because it is so well known, I refrain from recounting the persuasive legislative history of the law. Suffice it to say that the Chandler Act was passed after unusual study, including the extensive report of the Securities and Exchange Commission (pursuant to the direction of Congress) on the evils of past reorganization practices, and after a long congressional campaign, wherein every conceivable objection to the new procedure was pressed on the legislative body with the best vigor and persistence.

the district court, on its own motion or as soon as the matter was in any way called to its attention, to dismiss the XI petition.

Though the debtor contends otherwise, it seems hardly open to argument that had this company filed a voluntary petition under X, or had an involuntary petition been filed against it under X, the district court would have found it necessary to approve the petition as properly filed. The corporation's deficit stands at \$18,000,000. It has assets, based on June 1, 1939, market values, of \$7,076,515, and liabilities of \$5,551,416, excluding the contingent liability of over \$3,800,000, the modification of which is the sole object of this XI proceeding. There are almost 900 individual investors holding the share certificates representing this contingent liability. Public investors are interested in other debenture issues of the debtor, due in 1944, and the company's stock, of which 900,000 shares are outstanding, is listed and traded in on the New York Stock Exchange. In view of the corporation's size, character, and degree of insolvency, the appropriateness of a Chapter X proceeding, had a Chapter X proceeding been initiated, could not be denied.

Under § 146(2) of Chapter X, a petition filed under that Chapter may not be approved if the judge believes that adequate relief would be obtainable under Chapter XI. Had this debtor filed a Chapter X petition, the court would have been compelled to make an affirmative finding that adequate relief could not be obtained under XI. If the initiation of a X proceeding by this debtor would necessarily have led to such a finding, the same finding should be made when, as here, the debtor has filed under XI. The adequacy of relief under XI is clearly the same issue whether it arises in the setting of a Chapter X petition or in the setting of Chapter XI.

It is true that there is no provision in Chapter XI authorizing the court to dismiss petitions as improperly filed. But there is no such provision in the sections of the statute dealing with ordinary bankruptcies, and yet petitions have been dismissed and adjudications have been vacated over and over again, on grounds that were jurisdictional and on grounds that were not. See, particularly, *In re Nash, D. C. S. D. W. Va.*, 249 F. 375; *Blackstock v. Blackstock*, 8 Cir., 265 F. 249; *Vassar Foundry Co. v. Whiting Corp.*, 6 Cir., 2 F. 2d 240, 241 ("whether or not this objection is called jurisdictional, it is one upon which creditors must have a right to be heard"). This follows the well settled view that a bankruptcy proceeding is, after all, an action in equity and subject to the rules governing suits in equity. *Pepper v. Litton*, 60 S. Ct. 238; *Kroell v. New York Ambassador, Inc.*, — F. 2d —, December 18, 1939.

Whether a corporation with securities so widely and publicly held, with investors so scattered, so numerous, that they cannot be given adequate protection under the machinery of XI, can secure adequate relief for its financial distress, and whether any plan inaugurated under those limited agencies can properly satisfy the requirements of fairness, equity, and feasibility required of § 366 before the court may approve

it is an issue which the court must face and adjudicate. It is suggested, however, that this is not a matter of jurisdiction. Just what that chameleon word actually means here is not clear. If it means safe from collateral attack, that may be conceded. *Stoll v. Gottlieb*, 305 U. S. 165. If it means a necessary prerequisite to judicial action, then we are dealing with jurisdictional requirements. Without placing too much emphasis on a question-begging label, we can say that here we are dealing with prime necessities of judicial action, and that whenever the court finds they are not present, it is its duty to cease to act.

My brothers do not now choose to consider whether this debtor could properly have filed under Chapter X; instead they say that so long as the debtor could become a bankrupt, it has an indefeasible privilege to file under XI. Without discussing whether they are precluding the approval of a petition under X as to this debtor, they add that they see no reason why "a large" corporation with publicly held securities may not obtain adequate relief under XI. "Adequate relief" is a flexible phrase, but presumably it refers to relief for all the parties to the reorganization. "Adequate relief" is also an empty phrase, as empty as its companion "fair and equitable," until its meaning has been filled in by a series of judicial decisions. It seems to me clear that the investing public cannot obtain adequate relief in a Chapter XI proceeding; such, indeed, is the whole meaning and purpose of the safeguards imposed by Chapter X. An independent trustee is not required under XI, as it is under X; investors may not propose plans under XI, as they may under X; acceptances may be solicited prior to confirmation under XI, as they may not under X; voters are not entitled to the S. E. C.'s disinterested advice as an experienced financial counsel, as they are in X. Additional differences in protection can be and have been pointed out. *In re Reo Motor Car Co., Debtor*, No. 24816, D. C. E. D. Mich., October 1, 1939.

In addition to the problems presented by the wide public ownership of the debtor's securities, note may be made of another consideration which prevents these creditors from obtaining adequate relief under Chapter XI. It may be easily demonstrated that this debtor is insolvent. On the debtor's own figures, its assets barely exceed 7,000,000, while its liabilities total \$5,551,416, without including the "contingent" liability of \$3,800,000 here to be modified. The principal obligation which the debtor guaranteed matured on June 1, 1939, and this indebtedness is no longer contingent, as the institution of the XI proceedings so clearly shows. Since the company is insolvent, application of the principles of *Northern Pacific Ry. v. Boyd*, 228 U. S. 482, demands that the stockholders be eliminated, or their equity has disappeared, they have made no new cash contribution, and the preservation of their interest is not shown to be essential to the successful continuation of the enterprise. *Case v. Los Angeles Lumber Products Co.*, 60 S. Ct. 1.

Yet Chapter XI affords no method of eliminating stock interests, unless it be by importing the bankruptcy sale. Section 357, specifying what an arrangement may include, makes no mention of provisions affecting stock. That the principles of the Boyd case are nevertheless applicable to proceedings under Chapter XI can hardly admit of doubt: an arrangement may not be confirmed unless it is found to be "fair and equitable and feasible" [§366 (3)], words which we are told are words of art, incorporating the rules laid down in *Northern Pacific Ry. v. Boyd*, supra; *Case v. Los Angeles Lumber Products Co.*, supra. If creditors of this debtor may invoke the Boyd case in XI to eliminate the stockholders, yet find the machinery of XI powerless to accomplish the elimination, they may plausibly contend that in XI they cannot obtain adequate relief. And if the Boyd case is not the law of Chapter XI,⁵ perhaps that fact alone would be sufficient reason for declaring that for this debtor and its creditors,⁶ the relief offered by XI is inadequate.

If my brothers are correct it is possible for any large corporate debtor, untroubled by the necessity of adjusting a secured debt, to choose between proceeding under Chapter X and under Chapter XI. Far too often XI will be chosen, because of its undoubted swiftness and its happy immunity from judicial and administrative control. A temporary palliative for an incurable financial disease may often be obtained under XI by adjusting a single indebtedness, and the usually optimistic management may put off for a time the evil day of reckoning when the drastic remedies of Chapter X become inescapable. Here the district judge announced from the bench that he was of the opinion that a Chapter X reorganization would be preferable, and, upon being assured by counsel for a creditor group that an involuntary X petition would be filed immediately, he stated his intention to dismiss the XI proceedings. Counsel for the debtor and for other creditors interposed, and in open court counsel for the debtor agreed to make an immediate interest payment of 1½ percent, for the admitted purpose of dissuading the creditor from filing a petition under X. The creditor consented, the court approved, and the XI proceedings were continued.

Since the district court, though questioning the success of this proceeding felt, nevertheless, that it must let it go on to its doubtful conclusion, I would return the order denying dismissal and the order of reference for a re-examination of the problem in the light of the principles just stated. Moreover, since these views lead me directly to the conclusion that the S. E. C. has an important public responsibility of which it cannot be relieved merely by the device of initiating a proceeding designed to exclude it, I think the court exercised a wise and sound discretion in authorizing the Commission to intervene. The cases cited

⁵ For a discussion of the applicability of the Boyd case to Chapter XI, see 48 Yale L. J. 1334, 1357-1362.

⁶ The Boyd case will not prevent successful arrangements under XI in corporate situations where creditors can maintain the business as a going concern only by conceding the preservation of existing stock interests. This will be the case, and XI will be appropriate in every small commercial enterprise where management and stock are identical: it will be less and less the case, and XI will be inappropriate, as the particular business is larger and management and the ownership of stock become the functions of different people.

the opinion to the contrary seem to me merely to support a conclusion from an accepted premise, not to demonstrate the soundness of the premise. Under the view of the Commission's public obligations which I have suggested, cases such as *Pennsylvania v. Williams*, 326 U. S. 176, and *Gordon v. Ominsky*, 294 U. S. 186, afford direct support of the order below.

Moreover, my brothers have limited their search to one for an absolute right of statutory intervention and overlook the provisions for permissive intervention in the discretion of the court, which is an important and salutary feature of the new procedure. The criticisms in the opinion to Professor Moore's treatise on Federal Practice (2 Moore's Federal Practice 2307, 2327) are limited to those discussing either past history or the absolute right and overlook the apposite material showing the power of the court to act when the intervenor presents a claim or defense which has a question of law or fact in common with the main action and the desirability of such action when thereby important questions will be authoritatively adjudicated and further litigation avoided. 2 Moore's Federal Practice 2331-3, 2350-66; Levi and Moore, Federal Intervention, 45 Cal. L. J. 565; Federal Rule 24 (b) (2). I have stated elsewhere my concern at what seems to me undue limitation of these wise provisions. *Commercial Cable Staffs' Asso. v. Lehman*, 107 F. 2d. See 49 Yale L. J. 590, 593-4. Here are important questions, the ultimate decision of which cannot be avoided. Here and now is an appropriate occasion for their disposition.

The final question, whether the Commission may appeal, seems to me more difficult. The curiously truncated privilege of intervention without the privilege of appeal, given the Commission in Chap. K, § 208, suggests a like limitation here. Why this unusual restriction on intervention was adopted may not be altogether clear; it seems designed to emphasize the ultimate judicial character of corporate reorganization. So the Commission must place its reliance on a plan before the court, but the action to be taken thereon is a judicial responsibility entirely. When the Commission intervenes to point out that an arrangement cannot be substituted for the proposed reorganization, a similar restriction on the right of appeal may be imposed. Here, however, the intervention was for another purpose, the settling of a vital point of statutory construction, something which cannot be accomplished without appeal. Since the general rules of intervention do not prohibit appeal, the court's earlier order allowing appeal for a specific purpose seems not unreasonable.

Since the district court allowed intervention for the one purpose of testing the court's jurisdiction in the light of the statute, the order of reversal here, strictly speaking, may not prevent intervention on the issue of feasibility of a proposed arrangement. But the language of the opinion goes to the extent of such a prohibition, in effect forbidding any action by the Commission so long as the corporation maintains within the section of an XI proceeding. This I deplore. It

renders the Commission impotent for the public interest in a large class of cases and goes far to render abortive what might have proved one of the most important corporate reforms of modern times.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February one thousand nine hundred and forty.

Present: HON. THOMAS W. SWAN, HON. AUGUSTUS N. HAND, HON. CHARLES E. CLARK, Circuit Judges.

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT CO.,
DEBTOR-APPELLANT, SECURITIES AND EXCHANGE COMMISSION, APPELLANT.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of intervention of said District Court be and it hereby is reversed. Further ordered that the appeals of the Securities and Exchange Commission be and hereby are dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, Clerk.

Order for mandate

United States Circuit Court of Appeals, Second Circuit

Filed Feb. 2, 1940—D. E. Roberts, Clerk.

United States of America, Southern District of New York

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 444, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of United States Realty and Improvement Co., Debtor-Appellant, Securities and Exchange Commission, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighth day of February, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS, Clerk.

Supreme Court of the United States

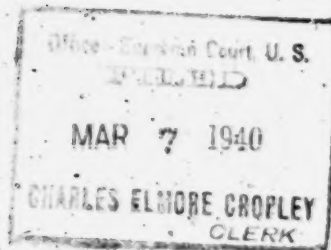
Order allowing certiorari

Filed April 1, 1940

the petition herein for a writ of certiorari to the United States
Court of Appeals for the Second Circuit is granted.

and it is further ordered that the duly certified copy of the
script of the proceedings below which accompanied the petition
be treated as though filed in response to such writ.

FILE COPY



No. **796**

In the Supreme Court of the United States

OCTOBER TERM, 1939

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

UNITED STATES REALTY AND IMPROVEMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

UNITED STATES REALTY AND IMPROVEMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered February 2, 1940, (1) reversing an order of the United States District Court for the Southern District of New York allowing the Commission to intervene in proceedings under Chapter XI of the Bankruptcy Act, and (2) dismissing appeals taken by the Commission from two orders of the District Court, one of which denied the Commission's motion to dismiss the proceedings for lack of jurisdiction of the Debtor under Chapter XI, and the other of which referred the proceedings to a referee for further action.

OPINIONS BELOW

The District Court filed no written opinion. It expressed its views and announced its decision in open court (R. 336-339). The opinion of the Circuit Court of Appeals (R. 420) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 2, 1940 (R. 430). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a corporation which has securities outstanding in the hands of the public may institute a proceeding for an arrangement under Chapter XI of the Bankruptcy Act or whether it can reorganize under the Bankruptcy Act only pursuant to the provisions of Chapter X.
2. Whether a petition for an arrangement under Chapter XI should be dismissed when the facts disclose that no fair, equitable, and feasible plan may be consummated under Chapter XI.
3. Whether the Securities and Exchange Commission, as an agency charged with the duty of administering the safeguards provided by Congress for public investors in reorganizations under Chapter X, was properly permitted to intervene in proceedings instituted under Chapter XI by a publicly-held corporation for the limited purpose of moving

to dismiss those proceedings on the ground that the Debtor could reorganize under the Bankruptcy Act only under Chapter X, and, if so, whether it was entitled to appeal from an adverse order.

STATUTE INVOLVED

Chapters X and XI of the Bankruptcy Act (11 U. S. C. Supp. IV, Secs. 501 *et seq.* and 701 *et seq.*) are involved in this proceeding substantially in their entirety. Because of their length they are not printed as parts of this petition, but copies thereof have been filed with the Clerk for the convenience of the Court.

STATEMENT

The Debtor, a New Jersey corporation having its principal place of business in New York City, owns and manages real estate investments (R. 6-7, 103). It owns all the capital stock of Trinity Buildings Corporation of New York (hereinafter called Trinity) (R. 7). The Debtor and Trinity have outstanding three classes of securities which are widely held by the public (R. 7, 111, 134).

The Debtor is guarantor of the principal, interest and sinking fund payments on publicly held first mortgage certificates issued by Trinity (R. 7). On June 1, 1939, the principal of the Trinity certificates, amounting to \$3,710,500, became due (R. 7-8). Both Trinity and the Debtor defaulted in the payment of the principal of these certificates, as well as in the payment of an installment of interest amounting to \$102,038, which became due at the same time (R. 171).

In addition to its liability on its guaranty of the Trinity certificates, the Debtor has liabilities totaling \$5,551,416 (R. 375). Included in these liabilities are two series of publicly held debentures, aggregating \$2,339,000, which will mature on January 1, 1944 (R. 375). Both series of debentures are secured by a pledge of admittedly valueless stock owned by the Debtor (R. 211-212, 227, 382). The Debtor has outstanding 900,000 shares of stock which are listed on the New York Stock Exchange (R. 111, 134).

The claimed value of the Debtor's assets is \$7,076,515 (R. 375), of which \$5,200,000 represents an investment in a building mortgaged to secure a \$3,000,000 bank loan (R. 192-194, 375). The Debtor's current assets total less than \$400,000 (R. 375). Each year since 1936, the Debtor has suffered a net loss, not including interest charges under the guaranty of the Trinity certificates (R. 59).

Prior to the maturity of the Trinity certificates, the Debtor and Trinity jointly proposed a Plan and Arrangement to the certificate holders for the purpose of modifying their respective obligations on the certificates, but which was to leave unaffected the other indebtedness and stock of the Debtor (R. 30, 40-41). The maturity of the certificates was to be extended, the interest reduced, and the sinking-fund payments modified. The Debtor's guaranty was to be modified to conform to these changes in principal and interest, and its present

guaranty of sinking-fund payments was to be eliminated entirely (R. 39).

The Plan and Arrangement was to be consummated by the institution of two proceedings: a proceeding instituted by the Debtor under Chapter XI of the Bankruptcy Act for an arrangement to modify its guaranty of the Trinity certificates, and a subsequent proceeding to be instituted by Trinity in the state courts under the Burchill Act (New York Real Property Law, Secs. 121-123) to conform Trinity's primary obligation to the modified guaranty (R. 33-34).¹ The Plan provided, however, that the modification of the Debtor's guaranty in the Chapter XI proceeding was to stand even though the state court should subsequently refuse to confirm the proposed modification of Trinity's obligation (R. 34).

On May 31, 1939, pursuant to this Plan, the present proceeding was commenced by the filing of a petition under Chapter XI, accompanied by a plan of arrangement embodying the proposed modification of the guaranty. On July 18, 1939, the Securities and Exchange Commission asked leave to intervene in the proceeding for the purpose of objecting by appropriate motions to the jurisdiction of the court and of appealing in the event

¹ Debtor's counsel stated that the Debtor desired prior approval of the arrangement by the United States District Court for the "pressure" it would put on the state court before which the Burchill Act proceedings would be brought (R. 277).

that its motions were denied (R. 133-138). The District Court entered an order on July 28, 1939, permitting the Commission to intervene (R. 142-143). The Commission then moved the court to vacate the order approving the Debtor's petition, to dismiss the proceeding, and to deny confirmation of the proposed arrangement on the grounds: (1) that the court did not have jurisdiction over the proceeding because Chapter XI does not apply to a debtor corporation which has securities outstanding in the hands of the public; and (2) that the proposed arrangement could not properly be confirmed under Chapter XI, because, among other reasons, the purpose of the proceeding was to modify the Debtor's obligation on its guaranty while leaving its stock issue and other obligations unaffected (R. 145-146). The Commission's motions were denied (R. 149-150) and the cause referred to a referee for further proceedings (R. 151).

The Commission thereupon appealed to the court below both from the order denying its motions and from the order referring the proceeding to a referee (R. 392-393). An appeal was also taken by the Debtor from the order of the District Court permitting the Commission to intervene (R. 394). The court below (Clark, J., dissenting) held: (1) that the proceedings were properly brought under Chapter XI and the District Court consequently had jurisdiction; and (2) that the District Court erred in allowing the Commission to intervene.

7
The court below consequently reversed the order of intervention and granted a motion by the Debtor to dismiss the Commission's appeal (R. 430).²

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In failing to hold that the District Court lacked jurisdiction of the Debtor, as a corporation with publicly held securities, under Chapter XI.

(2) In holding that any corporation which could become a bankrupt may file a petition for an arrangement under Chapter XI.

(3) In failing to hold that the District Court properly permitted the Commission to intervene for the purpose of moving to dismiss the Debtor's petition under Chapter XI, and to appeal.

(4) In reversing the order granting the Commission leave to intervene.

(5) In dismissing the Commission's appeal from the orders denying its motion to dismiss the proceeding and referring the proceeding to a referee for further action.

² The judgment of the court below dismisses the appeal (R. 430). The majority of the court, however, ruled upon the merits, concluding (Clark, J., dissenting) that any corporation which can be a bankrupt may file under Chapter XI (R. 422-423). Consequently, a mere reversal of the judgment dismissing the appeal and a remand of the case for consideration on the merits by the court below would grant the petitioner no relief. If the writ is granted, therefore, the merits must be considered, as well as the standing of the Commission to intervene and appeal.

REASONS FOR GRANTING THE WRIT

The decision below is one of first impression in the Circuit Courts of Appeals.³ Although there is, therefore, no conflict of decisions, the questions raised are of such large importance in the administration of the corporate reorganization provisions of the Bankruptcy Act that review by this Court is, we believe, plainly warranted. The decision below, if allowed to stand, will render the Commission impotent in a large class of cases to perform the duty entrusted to it by Congress of protecting investors in corporate reorganization proceedings, and will to a large extent nullify the Congressional safeguards written into Chapter X of the Bankruptcy Act.

The principal issue in the case is the relationship between Chapters X and XI of the Act. Petitioner's position is that Congress intended Chapter X proceedings to be the exclusive method by which corporations with securities outstanding in the hands of the public can reorganize in bankruptcy and that

³ There is, however, a conflict among the district courts on the question of whether a corporation which has securities outstanding in the hands of the public may file a petition under Chapter XI. The decision of the District Court for the District of Maryland in *In the Matter of Credit Service, Inc.*, No. 9340, decided January 18, 1940, is in accord with the decision below. A contrary ruling was made by the District Court for the Eastern District of Michigan in *In re Reo Motor Car Co.*, No. 24816, decided October 3, 1939. In the latter case the court, holding that the publicly held securities of the debtor made Chapter X proceedings appropriate, overruled a motion to dismiss a Chapter X proceeding which was based on the asserted availability of Chapter XI.

the District Court therefore had no jurisdiction over the proceedings instituted by the Debtor under Chapter XI. Petitioner also contends that, as the agency charged by Congress with the duty of administering the safeguards provided for investors in Chapter X, it was properly permitted to intervene in the present proceeding under Chapter XI for the purpose of moving to dismiss the petition on the ground that the Debtor could reorganize in bankruptcy only under Chapter X.

1. The court below, in holding that the petition was properly filed under Chapter XI, read the statute with literal exactness. Section 322 provides that a "debtor" may file a petition under Chapter XI, and Section 306 (3) provides that "debtor" means a person who could become a bankrupt under Section 4. Since the respondent could become a bankrupt under Section 4, the statute, construed literally and without regard to the purposes sought to be achieved by its enactment, permitted the procedure adopted.

Admittedly, in the usual case, the courts may not go behind the express language of a statute, for the presumption is strong that the words used in the statute express the intention of Congress in enacting it. But where, as here, it is perfectly plain from the structure of the statute as a whole, as well as from its legislative history, that Congress did not intend the result which would follow from literal application of the definition provisions, the presumption is overcome and the clear

purpose of Congress must be given effect. *Church of the Holy Trinity v. United States*, 143 U. S. 457; *American Security Co. v. District of Columbia*, 224 U. S. 491. See also *Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391; *United States v. Ryan*, 284 U. S. 167; *United States v. Katz*, 271 U. S. 354; *United States v. Jin Fuey Moy*, 241 U. S. 394; *Lau Ow Bew v. United States*, 144 U. S. 47. As this Court said in *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 126:

* * * the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part. * * *

Chapters X and XI were enacted in 1938 as part of a general revision of the Bankruptcy Act. In this revision, specialized types of proceedings were segregated in separate chapters. Chapter X pro-

* Chapters I-VII were retained for ordinary bankruptcy proceedings and several types of specialized proceedings were provided for in Chapters VIII-XIV. Chapter VIII contains provisions applicable to farm debtors and to railroads; Chapter IX contains provisions applicable to municipal corporations; Chapter X relates to corporate reorganizations; Chapter XI relates to arrangements of unsecured debts; Chapter XII relates to real property arrangements by persons other than corporations; Chapter XIII relates to wage earners' plans; and Chapter XIV relates to Maritime Commission liens.

vides a special procedure for the reorganization of corporations; Chapter XI provides for "arrangements" of the unsecured debts of any person who could become a bankrupt. The two chapters embody strikingly different schemes of reorganization. Chapter X, replacing former Section 77B, establishes comprehensive administrative machinery and protective provisions for the benefit of public investors, resting on the assumption that such investors, dissociated from control or active participation in the management, need impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems.⁵ In contrast, Chapter XI, replacing the "composition" procedure formerly embodied in Sections 12 and 74, establishes a rudimentary system of creditor control, resting on the assumption that the problem of rehabilitating debtors filing petitions under Chapter XI can be substantially settled at a single creditors' meeting.

Thus, except where the liabilities are under \$250,000, Chapter X requires the appointment of a disinterested trustee (Secs. 156-158). The trus-

⁵ This basic assumption underlies all of the federal securities legislation administered by the Commission, of which Chapter X is an integral part. Securities Act of 1933, 48 Stat. 74, 15 U. S. C. Secs. 77a-77aa; Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. Sec. 78a; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. Sec. 19; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U. S. C. A. Secs. 77aaa-77bbbb.

tee is required to make a thorough examination and study of the debtor's financial problems and management (Sec. 167 (3) (5)). He prepares a report thereon, which is sent to security holders with a notice to submit to him proposals for a plan of reorganization (Sec. 167 (6)). The trustee then formulates a plan, or reports the reasons why a plan cannot be effected (Sec. 169). To preserve for the court freedom to consider the plan on its merits, unhampered by the appearance of an accomplished fact, Section 176 voids consents to a plan obtained prior to its initial approval by the judge.

Chapter X also provides for participation in the proceedings by the Securities and Exchange Commission. If the judge finds that a plan presented is worthy of consideration, he may refer the plan to the Commission for a report, and must do so where the liabilities of the debtor (as in the present case) exceed \$3,000,000 (Sec. 172). When the plan is submitted to creditors after approval by the judge, it is accompanied by the report of the Commission and the opinion of the judge (Sec. 175). By this means investors are provided with an expert impartial analysis of the plan and of the debtor's financial condition, in the light of which the plan may be intelligently appraised. In addition, the Commission is authorized to participate generally in the proceedings as a party with the permission of the court, and with the duty to do so upon the request of the court (Sec. 205).

In contrast, Chapter XI provides a skeleton procedure for the modification of unsecured debts and contains no provision for the modification of secured debts or stock. The debtor files a petition which is accompanied by its proposed arrangement (Secs. 308 (1), 323, 357). Thereafter a meeting of the creditors is called (Sec. 334) at which creditors may elect a creditors' committee (Sec. 338). After acceptance by a majority in number and amount of the unsecured creditors, the proposal becomes effective upon a finding that it complies with the requirement of the statute (Secs. 362-367). In substance, that is all. There are no provisions for an independent study of the debtor's affairs, for making the information so obtained available to the security holders, or for assuring security holders adequate information before they vote upon a plan. There is no provision for the proposal of plans by anyone except the debtor, or for the participation in the proceedings of an independent trustee or an advisory agency.

The contrast between the procedures prescribed by these two chapters makes it plain that they were intended to be mutually exclusive. The problem, therefore, is to determine the precise sphere within which each chapter was intended by Congress to operate.

Under the decision of the court below, determination of the appropriate chapter depends solely on whether the debtor proposes to modify any of its obligations other than unsecured debts; if it seeks

to modify only unsecured obligations, it may resort to Chapter XI, despite the fact that its unsecured obligations are widely held by the public and despite the fact that the proceeding necessarily discriminates against the holders of the unsecured obligations in favor of the debtor's other security holders. The decision thus imputes to Congress the irrational intention of providing safeguards for mortgage bondholders but not for unsecured debenture holders, or for unsecured debenture holders when secured debts are also to be affected but not when the secured debts are to be left untouched. In our view, the obvious intent of Congress was rather that all public security holders should have the protection afforded by Chapter X and that Chapter XI should be confined to corporations with only trade and commercial creditors.

Congress had a good reason for prescribing different procedures for corporations with a public investor interest and for corporations without such an investor interest. Trade and commercial creditors who are equipped to evaluate plans in terms of self-interest and business knowledge may safely be left to appraise the infirmities of a proposed arrangement. But public investors, such as the holders of the Trinity mortgage certificates, who are uninformed, unorganized, and widely scattered, are obviously not qualified to make a similar appraisal. Yet, under the decision below, the question of whether these certificate holders shall have the protection of the safeguards pro-

vided for them by Congress depends solely on the decision of the management whether to seek an arrangement of the unsecured debts of the company under Chapter XI or to seek reorganization of the company under Chapter X.

The legislative history of Chapters X and XI confirms the fact that the decision below does not properly reflect the intention of Congress. In 1932 the Solicitor General, in a report on bankruptcy administration transmitted to Congress by the President, recommended that a statutory scheme for the reorganization of corporations be adopted (Senate Document No. 65, 72d Cong., 1st Sess.). The Solicitor General explained that such a statute was necessary and desirable to save a failing business conducted "by a corporation having securities outstanding in the hands of the public representing various interests in its property" (*id.* p. 90). Pursuant to this recommendation, Congress in 1934 enacted Section 77B of the Bankruptcy Act (c. 424, 48 Stat. 912). Thereafter, a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings filed with Congress the report of its counsel, showing that Section 77B had been improperly resorted to by small corporations. The report drew a distinction between small privately owned corporations with trade and commercial debts, on the one hand, and large corporations with securities held by the public, on the other hand; it recommended that the former be remitted to the

composition procedure in bankruptcy and that Section 77B or its equivalent be reserved for the latter (Senate Document No. 268, 74th Cong., 2d Sess., pp. 9-10). Relying in part on this report and in part on a study by the Securities and Exchange Commission of the degree of protection afforded to public investors in reorganizations,⁶ Congress enacted Chapter X.

The hearings before the House and Senate Committees on the bill which as enacted included Chapter X,⁷ and the reports of those committees on the bill,⁸ show clearly that Congress intended to supply an impartial administrative machinery to assist the courts and public investors in the solution of the complex problems which arise in the reorganization of corporations having securities outstanding in the hands of the public. The same hearings and reports show that Chapter XI was designed to afford small enterprises, in which there is no public investor interest, a simple system of debt adjust-

⁶ Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, Part 1 (1937).

⁷ Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., pp. 36-39, 45-47, 167, 199; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., pp. 9-15, 93-101.

⁸ H. Rept. No. 1409 on H. R. 8046, 75th Cong., 1st Sess., pp. 37-51; S. Rept. No. 1916 on H. R. 8046, 75th Cong., 3d Sess., pp. 19-31.

ment under the traditional bankruptcy method of direct creditor control.

2. The District Court lacked jurisdiction over the Debtor under Chapter XI, not only because the Debtor had securities outstanding in the hands of the public but also because, as the record discloses, no "fair and equitable" plan can be consummated in the proceeding and no arrangement can be proposed in good faith. Section 366 (3) of the Act, which provides that an arrangement may not be confirmed unless it is "fair and equitable and feasible," makes applicable to Chapter XI proceedings the rules of law enunciated in *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482. See *Case v. Los Angeles Lumber Products Co., Ltd.*, Nos. 23 and 24, present Term, decided November 6, 1939. No plan for this Debtor under Chapter XI can be fair and equitable within the meaning of Section 366 (3) because under Chapter XI only unsecured obligations may be modified. Under this chapter, therefore, any modification of the Debtor's guaranty on the Trinity certificates must be accomplished without altering the Debtor's large debenture and stock issues. Yet the Trinity certificate holders have a claim against the Debtor which must be satisfied before the stockholders receive anything and which ranks on a par with that of the debenture holders, since the security behind the debentures is valueless. Under the doctrine of the *Boyd* and *Los Angeles Lumber Co.* cases, no plan for the debtor

would be fair and equitable which modified the debtor's obligation on the guaranty but left the debenture holders and stockholders unaffected—yet such a plan is the only one which can be consummated under Chapter XI.

Under these circumstances, and particularly in view of the inappropriateness of the remedy sought to be employed by the Debtor, no arrangement proposed can meet the requirement of "good faith" contained in Section 366 (5). In this connection, it is also material that the debtor proposes to effect what is actually one plan of reorganization by the piecemeal use of courts of two different jurisdictions. Neither the federal nor the state court will have jurisdiction over the plan as a whole, in contrast to the complete supervision which the federal court would have over both the Debtor and its subsidiary in a proceeding under Chapter X.*

The majority of the court below expressed the view that these matters should be left for decision until the plan came up for confirmation. But in our view, a disclosure that a plan cannot be consummated in the proceeding goes to the jurisdiction and requires dismissal. Cf. *Tennessee Publishing Co. v. American Nat. Bank*, 299 U. S. 18; *O'Connor v. Mills*, 90 F. (2d) 665 (C. C. A. 8th);

* Chapter X provides for the filing of a petition for a subsidiary corporation in the same court which has approved the petition of the parent corporation (Sec. 129). Chapter XI contains no such provision.

R. L. Witters Associates, Inc. v. Ebsary Gypsum Co., 93 F. (2d) 746, 748-749 (C. C. A. 5th). Any other course must result in needlessly clogging court calendars with litigation predestined to be fruitless. Cf. *Tennessee Publishing Co. v. American Nat. Bank*, *supra*.

3. The holding of the court below that the District Court should not have permitted the Commission to intervene in the proceeding is, we believe, clearly erroneous and conflicts with the applicable decisions of this Court. The decision in effect establishes the principle that, in the absence of express statutory provision, a governmental agency may never intervene to protect the public from evasion or emasculation of the statute under which the agency functions, unless the agency has some property or pecuniary right affected by the litigation. This principle places such a drastic and far-reaching limitation upon the power, not only of the Securities and Exchange Commission but of all governmental agencies, to protect the public interest as plainly to call for review by this Court.

The court below, we submit, took a wrong approach to the problem. It pointed out first that Chapter X contains an express provision for Commission intervention while Chapter XI does not, and stated that this "raises a strong implication against intervention by the Commission" in Chapter XI proceedings (R. 423). It then addressed itself to the question of whether the interest of the

Commission in the litigation was so direct and immediate as to entitle it to intervene *as of right* and held that, since the Commission did not "stand to gain or lose directly by the decision of the court", it did not have such an interest (R. 424). There is no discussion in the opinion of whether the Commission's interest in the action is such as entitles it to intervene *with the permission of the court*. Since the District Court granted the Commission's motion to intervene, it is not necessary in this case to determine more than that the action of the District Court permitting intervention did not constitute an abuse of discretion, although we also believe that the Commission was entitled to intervene *as of right* (*infra*, p. 25).

The reliance of the court below upon the provision of Chapter X expressly providing for Commission intervention is, we believe, misplaced. The purpose of this provision is obviously to allow the Commission properly to perform the advisory functions with which it is charged in Chapter X proceedings. Since the Commission has no similar functions to perform in Chapter XI proceedings, a provision giving it a general right to participate in Chapter XI proceedings would be both inappropriate and superfluous.

The Commission did not intervene here in order to perform advisory functions, but to object against an improper exercise of the court's jurisdiction which, in the opinion of the Commission, nullifies the protection provided by Congress for investors.

Its standing to intervene, therefore, does not depend on the provisions of Chapter XI but upon the general principles governing intervention in the federal courts, as codified in Rule 24 of the Rules of Federal Procedure.

This Court has recognized that public officials and administrative commissions, federal and state, have a legitimate interest in resisting any endeavor to evade the provisions of the statutes in relation to which they have official duties. Cf. *Coleman v. Miller*, 307 U. S. 433, 442, 466; *Pennsylvania v. Williams*, 294 U. S. 176. The *Williams* case is strikingly similar to the present one. There a receivership proceeding was commenced in the federal court. The State of Pennsylvania filed a petition for leave to intervene and for an order directing the receiver to surrender the assets of the defendant association to the State Secretary of Banking for liquidation under the provisions of state law. The District Court denied the petition but this Court reversed, holding that the District Court, in the exercise of its discretion, should have discharged the receivers and directed the surrender of the property in their possession to the Secretary. The granting of this relief necessarily implies that the state had an interest sufficient to give it standing to intervene.

The majority opinion below attempts to distinguish the *Williams* case on the ground that the state "claimed a right to full possession and control

of the assets of the insolvents, not merely a right to advise or protect the public interest" (R. 423-424). The distinction, we submit, is unsound, for the interest of the state in the receivership proceeding was plainly not a property or possessory interest, but an interest in the enforcement of the state liquidation statutes for the protection of the public. That is precisely the type of interest which the Commission has in the present case. The fact that Congress sought to protect the investing public by making the Commission an advisory, rather than a liquidating, agency is immaterial; in each case the administrative body has the same interest in assuring that the public will receive the protection which the agency was designed to afford it.¹⁰

The decision of this Court in *The Exchange*, 7 Cranch 116, likewise supports the Commission's position. That case involved a libel filed by American citizens against a schooner which the libellants claimed to be their property. The schooner was in fact a French vessel of war in possession of French naval officers, although it was within the waters of the United States. After the libel was filed the United States District Attorney filed a "sugges-

¹⁰ See also *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14, 25, a suit brought to enjoin an order of the Interstate Commerce Commission, in which the Court held that state utility commissions, who had intervened in the suit, were "aggrieved" parties and therefore had a statutory right of appeal "because they officially represent the interest of their states in obtaining adequate transportation service."

tion" setting forth the facts and praying that the schooner be released.¹¹ The District Court dismissed the libel, but on appeal the Circuit Court reversed. The District Attorney thereupon appealed to this Court, which reversed the judgment of the Circuit Court and affirmed the judgment of the District Court dismissing the bill. The Court, first expressing the opinion that an American citizen cannot assert, in an American court, title to a public armed vessel in the service of a foreign sovereign, added (p. 146): "If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

The course sanctioned by this Court in *The Exchange* was almost identical with the course pursued by the Commission here. There the United States appeared in the proceedings in order to move their dismissal on the ground that the court had no jurisdiction and that an improper exercise of jurisdiction would be contrary to the public interest; its contentions having been overruled in the Circuit Court, an appeal to this Court was allowed. As pointed out in *Percy Summer Club v. Astle*, 110 Fed. 486, 489 (C. C. D. N. H.), the *Exchange* case illustrates that the principle allowing intervention

¹¹ Although the opinion in *The Exchange* does not speak of intervention, the procedure followed was the same as intervention, if it was not intervention in fact. This Court so recognized in *Stanley v. Schwalby*, 147 U. S. 508, 513.

by public authorities where the public interest is concerned "is of the broadest character, and is applied without formalities."¹²

The assumption underlying the decision below that in the absence of statutory provision a governmental agency may not apply to the courts to protect the public interest, as distinguished from its own pecuniary interest, is also directly contrary to the principle enunciated in *In re Debs*, 158 U. S. 564. There the Court upheld the power of the United States to file a bill in equity to enjoin obstruction by the defendant of the interstate transportation of persons and property, as well as of the carriage of the mails; the decision was expressly rested upon the principle that a government entrusted "with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other" and that it is immaterial that the government "has no pecuniary interest in the matter"

¹² Other cases in which governmental intervention has been allowed cannot satisfactorily be distinguished on the ground that in those cases a claim of title, a pecuniary interest, or a trustee's interest was involved. Those factors are material as establishing the existence of a public interest; they do not limit the character of the public interest, which, when otherwise shown to exist, is sufficient to justify intervention. Cf. *Helvering v. Davis*, 301 U. S. 619; *United States v. Minnesota*, 270 U. S. 181, 194; *Norman v. Consolidated Edison Co. of New York*, 89 F. (2d) 619 (C. C. A. 2d); *Winola Lake & Land Co., Inc. v. Gorham*, 17 F. Supp. 75 (M. D. Pa.).

(p. 584). Certainly a nonpecuniary interest sufficient to support an independent suit for the protection of the public is sufficient to support intervention for that purpose. Cf. *New York v. New Jersey*, 256 U. S. 296, 307-308.

The authorities cited establish the Commission's standing to intervene under Rule 24, since that Rule simply amplifies and restates the theretofore existing practice. See Advisory Committee's Note to Rule 24. The Commission may intervene either under clause (a) (2) of the Rule, which provides for intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," or under clause (b) (2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Here the Commission's interest in the litigation is not represented by any other party and that interest will be foreclosed by an adverse judgment which will effectively prevent the Commission from performing its functions in relation to the Debtor under Chapter X and will deprive the investors whom the Commission represents of the safeguards provided for them by Congress in Chapter X. Cf. *Percy Summer Club v. Astle*, 110 Fed. 486, 488 (C. C. D. N. H.); *United States v. C. M. Lane Lifeboat Co.*, 25 F. Supp. 410, 411 (E. D. N. Y.). And it is clear

that the Commission's claim raises a question of law in common with the main action, within the meaning of clause (b) (2), since the questions raised by the petition to intervene are addressed directly to the jurisdiction of the court to maintain the main action:

4. If the District Court properly exercised its discretion in permitting the Commission to intervene, it also properly gave the Commission a right to appeal from the orders denying its motions. An interest sufficient to warrant intervention is plainly sufficient to warrant appeal, after intervention, from a decision adverse to that interest. *Pennsylvania v. Williams, supra*; *The Exchange, supra*; *Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104 (C. C. A. 5th), certiorari denied, 302 U. S. 747. The general rules of intervention do not prohibit appeal and no considerations of policy make unreasonable the District Court's order allowing appeal.

The fact, adverted to by the court below, that Section 208 of the Act prohibits appeals by the Commission in Chapter X proceedings, does not, directly or by implication, limit the Commission's right to appeal in this case. The restriction imposed by Section 208 was designed to emphasize the advisory nature of the Commission's functions under Chapter X and the ultimate judicial character of the proceedings (see dissenting opinion of Clark, J., at R. 429). The restriction does not in

terms apply to the present case, since this is a Chapter XI rather than a Chapter X proceeding, and the policy reflected by the restriction is likewise inapplicable. The appeal was not taken by the Commission from the confirmation of a plan which it did not deem fair and equitable, but rather from an exercise of jurisdiction, based on a vital point of statutory construction, which the Commission believes to be in derogation both of the public interest and of the duties with which the Commission is charged under Chapter X in protecting that interest.

CONCLUSION

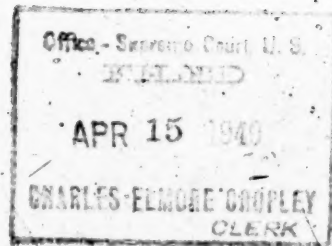
It is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

FRANCIS BIDDLE,
Solicitor General.

CHESTER T. LANE,
General Counsel,
Securities and Exchange Commission.

MARCH 1940.

FILE COPY



No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1939

SECURITIES AND EXCHANGE COMMISSION; PETITIONER

v

UNITED STATES REALTY AND IMPROVEMENT
COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The District Court filed no written opinion. It expressed its view and announced its decision in open court (R. 336-339). The opinion of the Circuit Court of Appeals (R. 420) is reported in 108 F. (2d) 794.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 2, 1940 (R. 430). The petition for writ of certiorari was filed March 7, 1940, and granted April 1, 1940. The jurisdic-

tion of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a corporation which has securities outstanding in the hands of the public may institute a proceeding for an arrangement under Chapter XI of the Bankruptcy Act or whether it can reorganize under the Bankruptcy Act only pursuant to the provisions of Chapter X.

2. Whether a petition for an arrangement under Chapter XI should be dismissed when the facts disclose that no fair and equitable plan can be consummated under Chapter XI and that no arrangement can be proposed in good faith.

3. Whether the Securities and Exchange Commission, as an agency charged with the duty of administering the safeguards provided by Congress for public investors in reorganizations under Chapter X, was properly permitted by the District Court to intervene in proceedings instituted under Chapter XI by a publicly-held corporation, for the limited purpose of moving to dismiss those proceedings on the ground that the Debtor could reorganize under the Bankruptcy Act only under Chapter X; and, if so, whether it was entitled to appeal from an adverse order.

STATUTE INVOLVED

Chapters X and XI of the Bankruptcy Act (11 U. S. C. Supp. V, Secs. 501 *et seq.* and 701 *et seq.*)

are involved in this proceeding substantially in their entirety. Because of their length they are not printed as part of this brief, but copies thereof have been filed with the Clerk for the convenience of the Court.

STATEMENT

The Debtor, a New Jersey corporation having its principal place of business in New York City, owns and manages real estate investments (R. 6-7, 103). It has outstanding 900,000 shares of no par stock which are listed on the New York Stock Exchange (R. 134). It has direct liabilities of \$5,551,416, of which only \$74,916 are current liabilities. The liabilities include two series of publicly held debentures, aggregating \$2,339,000, which will mature on January 1, 1944, and a \$3,000,000 note, due on August 12, 1939 (R. 375). The two series of debentures are secured solely by a pledge of admittedly valueless stock (R. 211-212, 227, 382); the \$3,000,000 note is secured by a first mortgage owned by the Debtor.

In addition to the Debtor's direct liabilities it is liable as a guarantor of first mortgage certificates of Trinity Buildings Corporation of New York (hereinafter called Trinity). All of the capital stock of Trinity is owned by the Debtor (R. 7). Trinity's principal liabilities are notes of \$10,442,483 due to the Debtor and first mortgage certificates in the amount of \$3,710,500, held by the public (R. 7, 51). These certificates are secured

by the real estate and buildings which are Trinity's only substantial assets (R. 51, 169). They are guaranteed as to principal, interest, and sinking fund payments by the Debtor. The principal became due on June 1, 1939 (R. 7-8). Both Trinity and the Debtor defaulted in its payment of the certificates, as well as in the payment of an interest installment of \$102,038, which became due at the same time (R. 171, 175).

The claimed value of the Debtor's assets is \$7,076,515. \$5,200,000 is represented by the stock of a subsidiary and a first mortgage on a building owned by the subsidiary; the mortgage is pledged to secure the \$3,000,000 note mentioned above. Current assets are less than \$400,000. The balance of the claimed assets consists chiefly of mortgages, loans, and other securities in the amount of \$555,655; an investment of \$477,300 in securities of an independent company; unimproved real estate valued at \$290,000; and a note receivable from a subsidiary for \$137,500 (R. 375)..

Each year since 1936 the Debtor has suffered a net loss, not including interest charges under the guaranty of the Trinity certificates (R. 59).

Prior to the maturity of the Trinity certificates, the Debtor and Trinity jointly proposed a Plan and Arrangement to the certificate holders for the purpose of modifying their respective obligations on the certificates, but which was to leave unaffected the other indebtedness and stock of the Debtor (R. 30, 40-41). The maturity of the cer-

tificates was to be extended, the interest reduced, and the sinking-fund payments modified.¹ The Debtor's guaranty was to be modified to conform to these changes in principal and interest, and its present guaranty of sinking-fund payments was to be eliminated entirely (R. 39).

The Plan and Arrangement was to be consummated by the institution of two proceedings: a proceeding instituted by the Debtor under Chapter XI of the Bankruptcy Act for an arrangement to modify its guaranty of the Trinity certificates, and a subsequent proceeding to be instituted for Trinity in the state courts under the Burchill Act to conform Trinity's primary obligation to the modified guaranty (R. 33-34).² The Plan pro-

¹ The maturity of the certificates was to be extended for ten years and one month and the interest was to be reduced from a fixed rate of $5\frac{1}{2}\%$ per annum to a fixed rate of 3% , with additional interest, if earned, of 1% until July 1, 1944, and thereafter of 2% to maturity, but the additional interest was to be paid at maturity whether or not earned. The sinking-fund obligations of \$200,000 per year (R. 22-27) were to be replaced by "if earned" obligations, with permission to use the fund to purchase certificates in the open market without, as at present, first exhausting tenders (R. 35-38).

² Debtor's counsel stated that the Debtor desired prior approval of the arrangement by the United States District Court for the "pressure" it would put on the state court before which the Burchill Act proceeding would be brought (R. 277).

The Burchill Act (N. Y. Real Property Law, Secs. 121-123) provides for reorganization of property covered by a trust mortgage, the plan to be binding upon all holders of bonds and certificates unless one-third dissent.

vided, however, that the modification of the Debtor's guaranty in the Chapter XI proceeding was to stand even though the state court should subsequently refuse to confirm the proposed modification of Trinity's obligation (R. 34).

On May 31, 1939, pursuant to this Plan, the present proceeding was commenced by the filing of a petition under Chapter XI, accompanied by a plan of arrangement embodying the proposed modification of the guaranty. Prior to filing the petition, however, the Debtor had solicited the consent of the Trinity certificate holders to the plan; these security holders were asked to execute a single instrument indicating their acceptance of both the arrangement to be proposed under Chapter XI and of the plan to be proposed in the Burchill Act proceeding (R. 65). About 53 percent of the holders of the certificates consented to the arrangement (R. 298).

On July 18, 1939, the Securities and Exchange Commission asked leave to intervene in the proceeding for the purpose of objecting by appropriate motions to the jurisdiction of the court and of appealing in the event that its motions were denied (R. 133-138). The District Court entered an order on July 28, 1939, permitting the Commission to intervene (R. 142-143). The Commission then moved the court to vacate the order approving the Debtor's petition, to dismiss the proceeding, and to deny confirmation of the proposed arrangement

on the grounds: (1) that the court did not have jurisdiction over the proceeding because Chapter XI does not apply to a debtor corporation which has securities outstanding in the hands of the public; and (2) that the proposed arrangement could not properly be confirmed under Chapter XI, because, among other reasons, the purpose of the proceeding was to modify the Debtor's obligation on its guaranty while leaving its stock issue and other obligations unaffected, and because the arrangement was not proposed in good faith (R. 145-146). The District Court, although expressing the view that "the proper course is for the * * * company to reorganize all of * * * its inter-company obligations, and the obligations of its subsidiaries under Chapter X" (R. 347), denied the Commission's motions (R. 149-150) and referred the cause to a referee for further proceedings (R. 151).

The Commission thereupon appealed to the court below both from the order denying its motions and from the order referring the proceeding to a referee (R. 392-393). An appeal was also taken by the Debtor from the order of the District Court permitting the Commission to intervene (R. 394). The court below (Clark, J., dissenting) held: (1) the proceedings were properly brought under Chapter XI because under Section 306 (3) any person who could become a bankrupt under Section 4 of the Act may institute Chapter XI pro-

ceedings. (2) The Commission had no right to intervene in a Chapter XI proceeding, even to object to the jurisdiction of the court, because there was, in contrast to Chapter X, no statutory authority to intervene and a nonpecuniary governmental interest was insufficient; accordingly there was no right to appeal. The court below consequently reversed the order of intervention and dismissed the Commission's appeal (R. 430).³

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In failing to hold that the District Court lacked jurisdiction of the Debtor, as a corporation with publicly held securities, under Chapter XI.

(2) In holding that any corporation which could become a bankrupt may file a petition for an arrangement under Chapter XI.

(3) In failing to hold that the District Court properly permitted the Commission to intervene for the purpose of moving to dismiss the Debtor's petition under Chapter XI, and to appeal.

³ The judgment of the court below dismisses the appeal (R. 430). The majority of the court, however, ruled upon the merits, concluding (Clark, J., dissenting) that any corporation which can be a bankrupt may file under Chapter XI (R. 422-423). Under these circumstances, a mere reversal of the judgment dismissing the appeal and a remand of the case for consideration on the merits by the court below would grant the petitioner no relief. Consequently, disposition of the case requires consideration of the merits as well as of the standing of the Commission to intervene and appeal.

(4) In reversing the order granting the Commission leave to intervene.

(5) In dismissing the Commission's appeal from the orders denying its motion to dismiss the proceeding and referring the proceeding to a referee for further action.

SUMMARY OF ARGUMENT

I

The District Court had no jurisdiction to entertain respondent's petition under Chapter XI because Chapter X is the exclusive method by which corporations with securities outstanding in the hands of the public may reorganize under the Bankruptcy Act. Although literal construction of the definition provisions of the Act would permit a publicly held corporation to file under Chapter XI, the structure of the Act as a whole as well as its legislative history shows unmistakably that such literal construction does not reflect the meaning of Congress. The rule is firmly established that the real purpose and intent of the legislative body must prevail over the literal import of the words used.

Chapters X and XI embody strikingly different schemes of reorganization. Chapter X provides detailed safeguards designed to protect the interests of public investors; Chapter XI provides merely a rudimentary system of creditor control designed for the corporation which has only trade and commercial creditors. The contrast between

the procedures prescribed makes it plain that Congress intended that all public security holders should have the protection afforded by Chapter X and that Chapter XI should be confined to corporations with only trade and commercial creditors.

This conclusion is confirmed by analysis of the present record which strikingly shows the inadequacy of the procedure prescribed by Chapter XI for a corporation in which there is a public investor interest. It is also confirmed by the legislative history of the statute which demonstrates that in enacting Chapters X and XI Congress had clearly in mind the distinction between a closely held corporation and a corporation with securities outstanding in the hands of the public.

II

The District Court should have dismissed the petition because no "fair and equitable" plan can be consummated in the proceeding and no arrangement can be proposed in good faith. Chapter XI provides only for the modification of unsecured obligations; under this chapter, therefore, alteration of the guaranty on the Trinity certificates must be accomplished without altering the Debtor's large stock issue and probably also without modifying its debentures. Yet the Trinity certificate holders have a claim against the Debtor which must be satisfied before the stockholders receive anything and which ranks on a par with that of the debenture holders, since the security behind the debentures is valueless. No plan which modified the

Debtor's obligation on the guaranty but left the stockholders and perhaps also the debenture holders unaffected would be "fair and equitable" as required by Section 366 (3); yet such a plan is the only one which could be consummated under Chapter XI. A disclosure that a plan cannot be consummated in the proceeding goes to the jurisdiction and requires dismissal.

Moreover, under the circumstances presented in this case no arrangement proposed can meet the requirement of "good faith" contained in Section 366 (5). And, even apart from the "good faith" provision, the District Court should have dismissed the proceeding on the ground that the procedure prescribed by Chapter X was more appropriate.

III

The holding of the court below that the District Court should not have permitted the Commission to intervene in the proceeding is clearly erroneous. In effect, the decision establishes the principle that, in the absence of express statutory provision, a governmental agency may never intervene to protect the public from evasion or emasculation of the statute under which the agency functions, unless the agency has some property or pecuniary right affected by the litigation. This drastic restriction upon the power of the Government to protect the public interest finds no support in precedent or policy.

The interest of the Commission in the present proceeding is twofold. First, as the agency designated by Congress to participate in Chapter X proceedings on behalf of public investors, it has a very real interest in assuring that such investors are not deprived of the safeguards contained in Chapter X through improper exercise of jurisdiction under Chapter XI. Second, it has an equally great interest in protecting its own functions under Chapter X from impairment through improper resort to Chapter XI by corporations which should file under Chapter X. The applicable decisions of this Court clearly establish that this interest is sufficient to support the District Court's order permitting the Commission to intervene.

If the District Court properly exercised its discretion in permitting the Commission to intervene, the Commission had the right to appeal from the orders denying its motion. An interest sufficient to warrant intervention is plainly sufficient to warrant appeal, after intervention, from a decision adverse to that interest.

ARGUMENT

I

CHAPTER X IS THE EXCLUSIVE METHOD BY WHICH CORPORATIONS WITH SECURITIES OUTSTANDING IN THE HANDS OF THE PUBLIC MAY REORGANIZE UNDER THE BANKRUPTCY ACT

The court below, in holding that the respondent had properly filed its petition under Chapter XI,

read the statute with literal exactness but without regard to the Congressional intention. Section 322 provides that a "debtor" may file a petition under Chapter XI, and Section 306 (3) provides that "debtor" means a person who could become a bankrupt under Section 4. Since the respondent could become a bankrupt under Section 4, the two sections, construed literally and without regard to the purposes sought to be achieved by the statute, permitted the procedure adopted.

This literal construction of the Act is, however, contrary to its plain meaning; as we point out below, the structure of the statute as a whole, as well as its legislative history, points unmistakably to the conclusion that Congress intended Chapter X proceedings to be the exclusive method by which corporations with securities outstanding in the hands of the public can reorganize in bankruptcy. Under this interpretation of the Act, the District Court had no jurisdiction over the proceedings instituted by the Debtor under Chapter XI.

Admittedly, in the usual case, it is presumed that the language of a statute expresses the intention of Congress in enacting it. But where, as here, there can be no reasonable doubt that adherence to the strict letter of the law would nullify rather than effectuate the intent of Congress, the presumption is overcome and the clear purpose of Congress

¹ In *In re Reo Motor Car Co.*, 30 F. Supp. 785 (E. D. Mich.), the court held that a corporation which has securi-

must be given effect. *Church of the Holy Trinity v. United States*, 143 U. S. 457; *American Security Co. v. District of Columbia*, 224 U. S. 494. See also *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391; *United States v. Ryan*, 284 U. S. 167; *United States v. Katz*, 271 U. S. 354; *United States v. Jin Fuey Moy*, 241 U. S. 394; *Lau Ow Bew v. United States*, 144 U. S. 47. "It is a familiar rule," this Court said in the *Church of the Holy Trinity* case, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" (143 U. S. at 459).

The principle that the real purpose and intent of the legislative body must prevail over the literal import of the words employed is particularly applicable in the case of a statute as complex as the Bankruptcy Act. This Court, in *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 126, pointedly

ties outstanding in the hands of the public may not file a petition under Chapter XI. This holding was made in connection with a motion to dismiss a Chapter X proceeding which was based on the asserted availability of Chapter XI. The same result was reached, without opinion, by the District Court for the Southern District of New York in *In re McKesson & Robbins*, No. 72697, decided December 27, 1938, a reorganization proceeding under Chapter X, although certain other factors were there present. *In re Credit Service, Inc.*, 30 F. Supp. 878 (D. Md.), is, however, in accord with the decision below.

observed, with reference to the income tax law, that:

* * * the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part. * * *

It is, of course, true that in any particular case it is a matter of judgment whether the provisions of the Act and their legislative background do clearly reveal a Congressional purpose at variance with the strict letter of the law. See, e. g., *Palmer v. Massachusetts*, 308 U. S. 79, 83; *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 277-278; *Wallace v. Cutten*, 298 U. S. 229.⁵ Here, however, such a variance is established by the very fabric of the Act and by every extrinsic guide to its interpretation; under the authorities above cited, therefore, the will of Congress, even though imperfectly

⁵ See also *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216, 218, where the Court said of the Bankruptcy Act itself: "To fix the meaning of these provisions there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."

⁶ There is a clear distinction between a case like that at bar, where the question is which chapter of a remedial statute Congress intended a particular type of company to resort to, and a case like *Iselin v. United States*, 270 U. S. 245, 251, where the question was whether a tax statute

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expressed, must be recognized and obeyed. See *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 391, quoting from Mr. Justice Holmes in *Johnson v. United States*, 163 Fed. 30, 32 (C. C. A. 1st).

A. THE EVIDENCE OF CONGRESSIONAL INTENT WITHIN THE PROVISIONS OF THE STATUTE

1. Chapters X and XI were enacted in 1938 as part of a general revision of the Bankruptcy Act. In this revision, specialized types of proceedings were segregated in separate chapters. Chapter X provides a special procedure for the reorganization of corporations; Chapter XI provides for "arrangements" of the unsecured debts of any person

could be enlarged by construction "so that what was omitted, presumably by inadvertence, may be included within its scope." See also *Wallace v. Cutten*, 298 U. S. 229, 237; *Osaka Shosen Line v. United States*, 300 U. S. 98, 101. In the present case, the construction for which we contend does not involve an extension of the scope of the statute but merely an exclusion from the remedial provisions of Chapter XI of publicly held corporations to which Congress did not intend the provisions of Chapter XI to apply.

Chapters I-VII were retained for ordinary bankruptcy proceedings and several types of specialized proceedings were provided for in Chapters VIII-XIV. Chapter VIII contains provisions applicable to farm debtors and to railroads; Chapter IX contains provisions applicable to municipal corporations; Chapter X relates to corporate reorganizations; Chapter XI relates to arrangements of unsecured debts; Chapter XII relates to real property arrangements by persons other than corporations; Chapter XIII relates to wage earners' plans; and Chapter XIV relates to Maritime Commission liens.

who could become a bankrupt. The intended scope of each Chapter is indicated by its ancestry. Chapter X replaced Section 77B, which in turn supplanted the equity receivership mechanism, as the normal reorganization procedure for corporations with widely distributed securities. Chapter XI, on the other hand, replaced the "composition" provisions of Sections 12 and 74^{*} as the normal procedure for adjusting the trade obligations of small individual and corporate businesses.⁹

Reflecting the difference in their genesis, the two Chapters embody strikingly different schemes of

^{*} H. Rep. No. 1409, 75th Cong., 1st Sess., p. 50; S. Rep. No. 1916, 75th Cong., 3rd Sess., p. 18.

⁹ The composition cases concluded under Section 12 for bankrupts and the composition and extension cases concluded under Section 74 for individuals during the period from 1932 through 1938 involved average liabilities of substantially less than \$50,000. Annual Reports of the Attorney General of the United States, 1932 to 1938, Exhibit 3 in each report. While no comprehensive figures are available to permit an accurate comparison of these figures with the size of equity receivership and Section 77B proceedings, a study made by a Senate committee of receiverships filed in the federal courts in California during the period from 1930 to 1933 showed average liabilities of approximately \$1,000,000. S. Rep. No. 365, 73rd Cong. 2d Sess., pp. 1-3. There are, of course, sporadic instances of the use of the composition procedure for large corporations. See, e. g., *In re Realty Associates Securities Corporation*, 69 F. (2d) 41 (C. C. A. 2d), certiorari denied, 292 U. S. 628; *In re O'Gara Coal Co.*, 260 Fed. 742 (C. C. A. 7th). But the rarity of such cases, and the inapposite nature of the composition sections, is indicated by the fact that when the need for more efficient reorganization procedure was first recognized by Congress

reorganization. Chapter X establishes comprehensive administrative machinery and protective provisions for the benefit of public investors, resting on the assumption that such investors, dissociated from control or active participation in the management, need impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems.¹⁰ In contrast, Chapter XI establishes a rudimentary system of creditor control, resting on the assumption that the problem of rehabilitating debtors filing petitions under Chapter XI can be substantially settled at a single creditors' meeting.

Thus, except where the liabilities are under \$250,000, Chapter X requires the appointment of a disinterested trustee (Secs. 156-158). The trustee is required to make a thorough examination

in 1934, it based that procedure on the equity receivership rather than upon the composition practice. Report of Counsel to the Special Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d Sess., p. 8; S. Doc. No. 65, 72nd Cong., 1st Sess., p. 90; H. Rep. No. 194, 73rd Cong., 1st Sess., *passim*.

¹⁰ This basic assumption underlies all of the federal securities legislation administered by the Commission; of which Chapter X is an integral part. Securities Act of 1933, c. 38, 48 Stat. 74, 15 U. S. C., Secs. 77a-77aa; Securities Exchange Act of 1934, c. 404, 48 Stat. 881, 15 U. S. C., Secs. 78; Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 838, 15 U. S. C. Supp. V, Sec. 79; Trust Indenture Act of 1939, c. 411, 53 Stat. 1149, 15 U. S. C. Supp. V, Secs. 77aaa-77bbbb.

and study of the debtor's financial problems and management (Sec. 167 (3) (5)). He prepares a report thereon, which is sent to security holders with a notice to submit to him proposals for a plan of reorganization (Sec. 167 (5) and (6)). The trustee then formulates a plan, or reports the reasons why a plan cannot be effected (Sec. 169). To preserve for the court freedom to consider the plan on its merits, unhampered by the appearance of an accomplished fact, Section 176 voids consent to a plan obtained prior to its initial approval by the judge.

In recognition of the fact that public investors in the debtor are likely to be widely scattered, Chapter X provides for their mobilization through specific provisions permitting them to act through agents or committees (Sec. 209) and making lists of security holders available (Secs. 163, 165). It provides for compensation of committees and other representatives (Secs. 241-243). It also provides safeguards against abusive practices by such committees. Section 211, for example, requires committees to file statements showing the circumstances surrounding their formation and Section 212 authorizes the court to disregard provisions in authorization obtained by committees which are unfair or contrary to public policy. The interests of public investors are further safeguarded by the provisions of Section 206 giving indenture trustees the right to be heard on all matters involved.

Chapter X also provides for participation in the proceedings by the Securities and Exchange Commission. If the judge finds that a plan presented is worthy of consideration, he may refer the plan to the Commission for a report, and must do so where the liabilities of the debtor (as in the present case) exceed \$3,000,000 (Sec. 172). When the plan is submitted to creditors after approval by the judge, it is accompanied by the report of the Commission and the opinion of the judge (Sec. 175). By this means investors are provided with an expert impartial analysis of the plan and of the debtor's financial condition, in the light of which the plan may be intelligently appraised. In addition, the Commission is authorized to participate generally in the proceedings as a party with the permission of the court, and with the duty to do so upon the request of the court (Sec. 208).

These provisions indicate a clear recognition by Congress of the necessity for improved reorganization machinery in the interests of public investors and for impartial and expert assistance to the district courts in order that they may more readily exercise the "informed, independent judgment" which this Court has recognized to be essential in reorganization cases. *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 115; *National Surety Co. v. Cariell*, 289 U. S. 426, 436. The Congressional reports show plainly that Chapter X was the medium designed to supply these safeguards (H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 43, 44, 47-48;

S. Rep. No. 1916, 75th Cong., 3d Sess., pp. 21, 30, 31).¹¹

No comparable safeguards are found in Chapter XI. It provides only a skeleton procedure for the modification of unsecured debts and contains no provision for the modification of secured debts or stock. The debtor files a petition which is accompanied by its proposed arrangement (Secs. 306 (1), 323, 357). Thereafter a meeting of the creditors is called (Sec. 334) at which creditors may elect a creditors' committee (Sec. 338). After acceptance by a majority in number and amount of the unsecured creditors, the proposal becomes effective upon a finding that it complies with the requirements of the statute (Secs. 362-367). In substance, that is all. There are no provisions for an independent study of the debtor's affairs, for making the information so obtained available to the security holders, or for assuring security holders adequate information before they vote upon a plan. No mention whatever is made of indenture trustees or of security-holder committees, other than the creditors' committee, and the court is given no power of control over such committees. And finally, there is no provision for the proposal

¹¹ See, e. g., House Report at 47-48: " * * * the court will have the benefits of expert and disinterested advice to aid it in the solution of the complicated financial and legal problems involved in the typical large reorganization. This should fill a long felt need and be welcomed by both courts and investors."

of plans by anyone except the debtor, or for the participation in the proceedings of an independent trustee or an advisory agency.¹²

The contrast between the procedures prescribed by these two chapters makes it plain that they were intended to be mutually exclusive. Indeed, this conclusion seems necessarily to follow from the provision of Section 146 (2) that a petition under Chapter X shall not be deemed to be filed in good faith if adequate relief would be obtainable under Chapter XI. Judge Clark pointed this out in his dissenting opinion (R. 426):

Under § 146 (2) of Chapter X, a petition filed under that Chapter may not be approved if the judge believes that adequate relief would be obtainable under Chapter XI. Had this debtor filed a Chapter X petition, the court would have been compelled to make an affirmative finding that adequate relief could not be obtained under XI. If the initiation of a X proceeding by this debtor would necessarily have led to such a finding, the same finding should be made when, as here, the debtor has filed under XI. The adequacy of relief under XI is clearly the same issue whether it arises in the setting of a Chapter X petition or in the setting of Chapter XI.

¹² A detailed comparison between the provisions of Chapter X and Chapter XI, in tabular form, is contained in the Appendix, pp. 53-55, *infra*.

Since the two chapters are mutually exclusive, the problem is to determine the precise sphere within which each chapter was intended by Congress to operate. Under the decision of the court below, determination of the appropriate chapter depends solely on whether the debtor proposes to modify any of its obligations other than unsecured debts; if it seeks to modify only unsecured obligations, it may resort to Chapter XI, despite the fact that its unsecured obligations are widely held by the public and despite the fact that the proceeding necessarily discriminates against the holders of the unsecured obligations in favor of the debtor's other security holders. The decision thus imputes to Congress the irrational intention of providing safeguards for mortgage bondholders but not for unsecured debenture holders, or for unsecured debenture holders when secured debts are also to be affected but not when the secured debts are to be left untouched. In our view, the obvious intent of Congress was rather that all public security holders should have the protection afforded by Chapter X and that Chapter XI should be confined to corporations with only trade and commercial creditors.

Congress had good reason for prescribing different procedures for corporations with a public investor interest and for corporations without such an investor interest. Trade and commercial creditors are usually relatively few in number and are

in a position to obtain adequate information and to appear effectively in their own interests.¹³ Since, in the normal case, such creditors are well equipped to evaluate plans in terms of self-interest and business knowledge, they may safely be left to appraise the infirmities of a proposed arrangement.¹⁴ But public investors, such as the holders of the Trinity mortgage certificates, who are uninformed, unorganized, and widely scattered, are obviously not qualified to make a like appraisal or similarly to protect themselves against impairment of their interests. Yet, under the decision below, the question of whether public investors shall have the protection of the safeguards provided for them by Congress depends solely on the decision of the debtor whether to propose its plan under Chapter XI or under Chapter X.

2. The irrationality of attributing to Congress the intention of allowing publicly held corporations

¹³ Chapter XI provides for the election of a creditors' committee at the first meeting of the creditors (Secs. 334, 338). This is peculiarly a trade creditors' method of handling the problems of financially embarrassed debtors. Only this committee may be compensated out of the estate. *In re Mac Fishman, Inc.*, 27 F. Supp. 33 (S. D. N. Y.).

¹⁴ The fact that Section 393a. (2) of Chapter XI provides for an exemption from the registration provisions of the Securities Act of 1933 (15 U. S. C., Sec. 77e) of an offering of securities pursuant to an arrangement does not indicate that Congress intended Chapter XI to be applicable to corporations with a public investor interest, since an offering to a large number of trade and commercial creditors may constitute a public offering which, apart from the exemption, would have to be registered.

to resort to Chapter XI is effectively illustrated by the present record. The Debtor is in an unhappy financial condition. The book value of its assets, as shown by its consolidated balance sheet, shrank from \$123,000,000 in 1930 to \$26,561,696 on December 31, 1938; on an unconsolidated basis its assets were shown as \$23,478,974 (R. 55). This book value, moreover, was greatly in excess of actual value; the Debtor itself revised its balance sheet as of June 1, 1939, to reflect present market and estimated values and as a result of this revision claimed a total value for all of its assets of \$7,076,515 (R. 375, 226, 229). The recent history of the Debtor has been one of successive losses.⁴⁵ Trinity, too, has operated at a loss, and, even if the proposed modification of its certificates were to be consummated, its earnings would, at least until the end of 1941, be insufficient by about \$50,000 a year to meet the fixed interest requirements (R. 177-178, 373). It is admitted that "No improvement in existing

⁴⁵ The Debtor's net losses (after interest charges, but not including any interest charges under the guaranty) for 1936, 1937, and 1938 were, respectively, \$190,886, \$121,771, and \$24,526 before depreciation (R. 59). After allowance for depreciation these losses were \$205,700, \$131,610, and \$25,215, respectively (R. 59). Trinity's operations resulted in net losses, after mortgage interest but before depreciation, of \$54,757, \$20,782, and \$51,546 for 1936, 1937, and 1938, respectively (R. 53). After allowances for depreciation these losses were \$239,847, \$205,748, and \$236,055, respectively (R. 53).

conditions or in earnings is expected in the immediate future" (R. 32).

Because the Debtor's petition has been filed under Chapter XI, there has been no thorough or impartial examination of this financial picture. The extent to which improvident management may have combined in the past with unforeseeable economic conditions to produce the Debtor's present condition has not been determined¹⁶ and there is no basis upon which an intelligent independent judgment can be formed as to the company's future prospects. Obviously Congress intended no such result; to the contrary, its plain purpose was that neither the court nor security holders should be required to pass upon or accept a plan of readjustment, such as that here involved, except upon the basis of a business-like investigation. The Trinity mortgage certificate holders should have been specifically informed that the modifications

¹⁶ By sheer chance the District Court discovered that Trinity had borrowed funds from a bank to meet the interest on its mortgage certificates due December 1, 1938, repaying the loan out of the income of the succeeding semi-annual period (R. 342-352). As a result, the Debtor was relieved of liability on the guaranty for the period ended December 1, 1938, while Trinity failed to earn the interest due on June 1, 1939, and defaulted thereon. Such transactions, testified the vice president of the Debtor, were "not with me an unusual procedure" (R. 350). In addition, transactions whereby Trinity became indebted to the Debtor for more than \$10,000,000 (R. 170) and the payment by Trinity to the Debtor of \$9,489,986 as interest on a note for \$8,781,192 (R. 171-172, 231-233) clearly call for independent examination.

proposed in the plan would still leave overburden-some fixed charges; that the conditions which caused the Debtor and Trinity to show net losses over a period of years would not be corrected by the plan; that the estimated earnings of Trinity for the next three years were less annually than the proposed annual fixed charges by almost \$50,000; and that continued payment of interest by the Debtor was highly doubtful in view of its net losses and its future prospects. Instead, the Debtor solicited acceptances to its proposed arrangement in advance of the institution of the judicial proceedings and upon the basis of its unconsolidated balance sheet as of December 31, 1938, reflecting book values grossly in excess of the actual values of its assets (R. 30, 55, cf. 375). Such advance solicitation would have been ineffective under Chapter X, and the availability to the court of the assistance of an independent trustee and of the Commission would have made impossible the solicitation of security holders on the basis of a disclosure so inadequate.

Moreover, by resorting to Chapter XI the Debtor proposes to effect what is actually one plan of re-organization by the piece-meal use of courts of two different jurisdictions. Neither the federal court in the Chapter XI proceedings instituted by the Debtor nor the state court in the Burchill Act proceedings to be instituted for Trinity will have jurisdiction over the plan as a whole. In contrast,

under Chapter X, which provides for the filing of a petition for a subsidiary corporation in the same court which approved the petition of the parent corporation (Sec. 129), the federal court would have complete jurisdiction over both the Debtor and its subsidiary.

Thus, concrete application of the provisions of Chapters X and XI to the Debtor confirms the conclusion flowing from analysis of the Act itself, i. e., that Congress could not have intended to permit the procedure approved by the court below. Chapter XI does not contain the machinery necessary to deal adequately with a corporation in which there is a public investor interest for the obvious reason that it was not designed to apply to such a corporation.

B. THE EVIDENCE OF CONGRESSIONAL INTENT CONTAINED IN THE LEGISLATIVE HISTORY OF THE STATUTE

The legislative history of Chapters X and XI also demonstrates that the decision below does not properly reflect the intention of Congress. In 1932 the Solicitor General, in a report on bankruptcy administration transmitted to Congress by the President, recommended that a statutory scheme for the reorganization of corporations be adopted (S. Doc. No. 65, 72d Cong., 1st Sess.). The Solicitor General explained that such a statute was necessary and desirable to save a failing business conducted "by a corporation having securities out-

standing in the hands of the public representing various interests in its property" (*id.* p. 90). Pursuant to this recommendation, Congress in 1934 enacted Section 77B of the Bankruptcy Act (c. 424, 48 Stat. 911, 912).¹⁷

Experience thereafter showed the need for amendment of Section 77B. A Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings filed with Congress the report of its counsel, showing that Section 77B had been improperly resorted to by small corporations. The report drew a distinction between small privately owned corporations with trade and commercial debts, on the one hand, and large corporations with securities held by the public, on the other hand; it recommended that the former be remitted to the composition procedure in bankruptcy and that Section 77B or its equivalent be reserved for the latter (S. Doc. No. 268, 74th Cong., 2d Sess., pp. 9-10). It stated in part (pp. 13-15):

There is * * * a clear distinction to be observed between a corporation, the stock of which is privately owned by a small number of persons, and which is indebted to trade creditors, and a corporation the securities of which are in the hands of the public. The problems of the former are not

¹⁷ This report was also considered by Congress in 1938 in connection with the revision of Section 77B which, as revised, became Chapter X (H. Rept. No. 1409, 75th Cong., 1st Sess., p. 2).

shared by the latter; the problems of the latter have no concern with the former.

* * * * *
 * * * * * when the stock of a corporation is in the hands of the public, when large numbers of persons in widely scattered areas have purchased it through stock and bond salesmen and dealers, when the stock of such corporation is listed upon exchanges, and traded and otherwise dealt in in large volume, or when a corporation, either with its stock in the hands of the public or the stock privately held, borrows money by the issuance of bonds or other evidence of indebtedness and such bonds are sold to the investing public, situations are presented that require different treatment.

The large number of stockholders of such corporation and equally large number of bondholders scattered over the entire United States, can neither be represented by private counsel nor be expected to be present at meetings. The number is too unwieldy for any simple or private arrangement. It is no small task to get their acquiescence to a plan, however fair; obviously it cannot be prepared by conference or arrangement with them.

* * * * *
 For the bankrupt insolvent corporation, not publicly owned or indebted, let us offer composition under section 12 of the Bankruptcy Act; for the others, let us have section 77B.

Relying in part on this report and in part on a study by the Securities and Exchange Commission of the degree of protection afforded to public investors in reorganizations,¹⁸ Congress in 1938 enacted Chapters X and XI. The hearings¹⁹ and reports²⁰ on the bill so enacted demonstrate what would in any event be obvious, that Congress did not intend these chapters to provide alternative reorganization procedures for the choice of the debtor. They show that in enacting Chapter X the purpose of Congress was to supply an impartial administrative machinery to assist the courts and public investors in the solution of the complex problems which arise in the reorganization of corporations having securities outstanding in the hands of the public; throughout the reports, there is repeated emphasis on "investors," "investor interests," "publicly owned corporations" and like phrases as related to the objectives of Chapter X.

¹⁸ Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees. This study and investigation of corporate reorganizations was made by the Commission at the direction of Congress. Securities Exchange Act of 1934, Sec. 211 (15 U. S. C., Sec. 78jj.)

¹⁹ Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., pp. 36-39, 45-47, 167-199; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., pp. 9-15, 93-101.

²⁰ H. Rept. No. 1409, 75th Cong., 1st Sess., pp. 37-51; S. Rept. No. 1916, 75th Cong., 3d Sess., pp. 19-31.

House Report, pp. 37-48, adopted in the Senate Report, pp. 2, 18. The same hearings and reports show that in enacting Chapter XI Congress had the entirely different purpose of affording small enterprises, in which there is no public investor interest, a simple system of debt adjustment under the traditional bankruptcy method of direct creditor control.²¹

It would, we submit, be a nullification of the will of Congress, as revealed in this legislative history and as embodied in the provisions of Chapters X

²¹ The express statement of the House Judiciary Committee with respect to Chapter XI indicates this quite plainly (H. Rept. No. 1409, 75th Cong., 1st Sess., pp. 50-51): "Section 12 has been recast; such features of section 74 are incorporated as are deemed of value and the combined sections are made Chapter XI of the Act under the title "Arrangement". * * *. The inclusion of corporations will permit a large number of the *smaller companies* such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive though fully adequate relief afforded by Section 12."

A representative of the National Bankruptcy Conference, which was responsible for the basic draftsmanship of the Act, explained the purpose of Chapter XI as follows, at the hearing before the House Committee on the Judiciary (Hearings on H. R. 8046, 75th Cong., 1st Sess., pp. 45, 46-47): "Subsection I [Chapter XI] is no different from the present section 12 which has been with us for years, except that it allows wider rights. A man goes in, who has a little business as a druggist, and wants to make a composition with his creditors. * * *. Now, the man that wants to avail himself of the present subsection 12, which is the composition section * * * is interested in making a composition with his merchandise creditors."

and XI, if literal application of the definition provisions were permitted to prevail over what Congress meant in fact to say. In the pungent words of Mr. Justice Holmes, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it; and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32 (C. C. A. 1st), quoted with approval in *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 391.

II

THE DISTRICT COURT SHOULD HAVE DISMISSED THE PETITION BECAUSE NO "FAIR AND EQUITABLE" PLAN FOR THE DEBTOR CAN BE CONSUMMATED UNDER CHAPTER XI AND NO ARRANGEMENT CAN BE PROPOSED IN GOOD FAITH

The District Court lacked jurisdiction over the Debtor under Chapter XI, not only because the Debtor had securities outstanding in the hands of the public but also because, as the record discloses, no "fair and equitable" plan can be consummated in the proceeding and no arrangement can be proposed in good faith.

Section 366 (3) of the Act, which provides that an arrangement may not be confirmed unless it is "fair and equitable," makes applicable to Chapter XI proceedings the rules of law enunciated in *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482. See *Case v. Los Angeles Lumber Products Co.*,

Ltd., 308 U. S. 106.²² No plan for this Debtor under Chapter XI can be fair and equitable, as required by Section 366 (3), because under that chapter only unsecured obligations may be modified. Consequently any modification of the Debtor's guaranty on the Trinity certificates under Chapter XI must be accomplished without altering the Debtor's large stock issue and probably also without altering its debentures, which are technically secured debts. Yet the Trinity certificate holders have a claim against the Debtor which must be satisfied before the stockholders receive anything and which ranks on a par with that of the debenture holders, since the security behind the debentures is valueless. Under the doctrine of the *Boyd* and *Los Angeles Lumber Co.* cases, no plan for the Debtor would be fair and equitable which modified the debtor's obligation on the guaranty but left the stockholders and perhaps also the debenture holders unaffected—yet such a plan is the only one which can be consummated under Chapter XI.

²² The respondent's suggestion in its brief in opposition (p. 4, note 2) that the *Los Angeles Lumber Co.* case is applicable only to corporations insolvent in the bankruptcy sense disregards the fact that all plans for all debtors under Chapters X and XI are required to be "fair and equitable." It also disregards the basis of the decision, which is that the debtor's property must first be applied to payment of the claims of creditors in full before stockholders are allowed to participate. There is no ground for any contention that this rule applies only in the case of debtors insolvent in the bankruptcy sense and that the rights of creditors of other debtors are to be less carefully protected.

The Debtor seeks to escape the force of the doctrine of the *Boyd* and *Los Angeles Lumber Co.* cases by urging that it is not applicable to the plan which the Debtor has proposed, since that plan is an "arrangement" rather than a "reorganization". The argument is, in effect, that Congress intended to permit corporations like the Debtor to propose and effectuate in a Chapter XI proceeding a plan which admittedly would not be "fair and equitable" under Chapter X. Plainly, substance cannot thus be subordinated to procedure; a plan, either under Chapter X or under Chapter XI, whether it be termed a "reorganization" plan or an "arrangement," cannot be fair and equitable if it proposes that stockholders, or one class of creditors, are to profit at the expense of another class of creditors. As this Court pointed out in the *Los Angeles Lumber Co.* case, "fair and equitable" are words of art with a definite content and meaning; there is, therefore, no room for the contention that they mean something different when used in Chapter XI than when used in Chapter X.²³

²³ This does not lead to the conclusion that Chapter XI has no legitimate sphere of operation, or stated otherwise, that the "fair and equitable" requirement makes the provisions of Chapter XI unworkable. As we have pointed out, Chapter XI was intended to be used by individual and small corporate enterprises, in which the going-concern value of the business is normally dependent on its proprietors. In such cases it may be necessary to provide for the retention of an interest in the debtor or its stockholders in order

The majority of the court below expressed the view that these matters should be left for decision until the plan came up for confirmation. The court apparently overlooked the fact that the issue of confirmation was before the District Court (R. 2). But in any event, the Commission's objection is not to the merits of any particular plan proposed, whether it be the original arrangement or any amended proposal which the Debtor may make; its objection is rather that *no* fair and equitable plan for this Debtor can be consummated under Chapter XI. In our view, a showing that no plan can be consummated in the proceeding goes to the jurisdiction and requires dismissal. Cf. *Tennessee Publishing Co. v. American Nat. Bank*, 299 U. S. 18; *O'Connor v. Mills*, 90 F. (2d) 665 (C. C. A. 8th); *R. L. Witters Associates, Inc. v. Elsgary Gypsum Co.*, 93 F. (2d) 746, 748-749 (C. C. A. 5th).²⁴ Any

to preserve the going-concern value and make reorganization possible. Consequently, if a proposed arrangement would realize at least as much for creditors as would liquidation—and such was generally the test in cases under Section 12 (see, e. g., *Fleischmann & Devine v. Saul Wolfson Dry Goods Co.*, 299 Fed. 15 (C. C. A. 5th))—there might be no unfairness in permitting the debtor or its stockholders to retain an interest, for in such cases the full value of the property would be applied to the claims of creditors to the largest extent possible. Cf. Rostow and Cutler, *Competing Systems of Reorganization*, 48 Yale L. J. 1334.

²⁴ The decision in *John Hancock Mutual Life Ins. Co. v. Bartels*, No. 33, present Term, decided December 4, 1939, does not require a contrary conclusion. That case involved Section 75 (8) of the Bankruptcy Act, a form of procedure unrelated to the statutes in issue, not requiring a "fair and

other course must result in needlessly clogging court calendars with litigation predestined to be fruitless. Cf. *Tennessee Publishing Co. v. American Nat. Bank*, *supra*.

Under these circumstances, and particularly in view of the inappropriateness of the remedy sought to be employed by the Debtor, no arrangement proposed can meet the requirement of "good faith" contained in Section 366 (5). The concept of "good faith" as used in the reorganization provisions of the Bankruptcy Act has been broadly construed; the issue raised is "whether or not the relief sought by debtor is within the purpose, intent and spirit of the statute." *In re Northeastern Water Companies, Inc.*, 24 F. Supp. 653, 655 (N. D. N. Y.) Under the comparable "good faith" clause in Section 77B, the courts refused to take jurisdiction where the interests of creditors would be better served in another pending proceeding or where it appeared unreasonable to expect that a plan of reorganization could be effected.²⁵ In our view the elements which go to the basic lack of

equitable" plan, and contemplating a three-year moratorium for farm debtors, with a privilege in the debtor to obtain his property at the end of or during the three years by paying the appraised or sale value thereof.

²⁵ *In re Williamsport Wire Rope Co.*, 10 F. Supp. 481 (M. D. Pa.), appeal dismissed, 78 F. (2d) 1023 (C. C. A. 3d); *Provident Mutual Life Ins. Co. v. University Evangelical Lutheran Church*, 90 F. (2d) 992 (C. C. A. 9th); *In re Tennessee Publishing Co.*, 81 F. (2d) 463 (C. C. A. 6th), affirmed on other grounds, 299 U. S. 18; *Manati Sugar Co. v. Mock*, 75 F. (2d) 284 (C. C. A. 2d).

jurisdiction over this Debtor in a Chapter XI proceeding, and which should lead to dismissal for that reason, lead also to the conclusion that the proceeding should be dismissed for lack of "good faith."²⁶

● Furthermore, even apart from the "good faith" provision, the bankruptcy court had ample power to dismiss the proceeding on the ground that another procedure was more desirable; its failure to exercise this power was, we submit, an abuse of discretion. In an analogous situation, this Court held that a district court abused its discretion in not dismissing an equity receivership proceeding for a building and loan association over which it had jurisdiction where the public interest made it preferable that the liquidation procedure provided by state law be followed. *Pennsylvania v. Williams*, 294 U. S. 176. Compare *Thompson v. Magnolia Petroleum Co.*, No. 481, present Term, decided March 25, 1940; *General American Tank Car Corp. v. El Dorado Terminal Co.*, No. 129, present Term, decided January 2, 1940. Similarly, several district courts undertook to exclude from Section 77B small corporations which were literally within its terms because the procedure provided by Section 12 was deemed to be more appropriate.²⁷

²⁶ This Court recently reemphasized the requirement of fair dealing between those who control corporations, on the one hand, and the creditors and stockholders of the corporation, on the other hand, not only with respect to the conduct of business dealings but also with respect to the use of legal procedures. *Pepper v. Litton*, No. 39, present Term, decided December 4, 1939.

²⁷ See, e. g., Rule 77B-2 (i) of the District Court for the Southern District of New York. The principle underlying

This case presents the precise converse of that situation and a similar rule should be applied.²⁸ The rule is peculiarly apposite here where the assumption of jurisdiction by the District Court was in derogation of the policy of Congress and of the public interest.

III

THE COMMISSION WAS PROPERLY PERMITTED TO INTERVENE FOR THE PURPOSE OF OBJECTING TO THE JURISDICTION OF THE DISTRICT COURT AND COULD APPEAL FROM AN ADVERSE DECISION

1. The holding of the court below that the District Court should not have permitted the Commis-

this rule is now embodied in Sections 130 (7) and 146 (2) of Chapter X which require that every petition under Chapter X shall allege the specific facts showing the need for relief under that chapter and why adequate relief cannot be obtained under Chapter XI, and which require dismissal for lack of "good faith" when such a showing is not made.

²⁸ Cf. Rostow and Cutler, *Competing Systems of Corporate Reorganization*, 48 Yale L. J. 1334, 1366 (1939): "No petition can be approved as properly filed under Chapter X until the court has determined that the system of Chapter XI could not provide adequate relief in the situation of the case. This oblique definition of jurisdiction under Chapter X can be evaded at will unless a comparable condition is read into Chapter XI. * * * If petitions under Chapter X are accepted when relief under Chapter XI would be inadequate, petitions under Chapter XI should be rejected for the same reason; and the prospective inadequacy of relief under Chapter XI should be the same question when presented as an issue in Chapter XI proceedings as when it arises at the hearing on the approval of the petition, in a Chapter X proceeding."

sion to intervene in the proceeding is, we believe, clearly erroneous. In effect, the decision establishes the principle that, in the absence of express statutory provision, a governmental agency may never intervene to protect the public from evasion or emasculation of the statute under which the agency functions, unless the agency has some property or pecuniary right affected by the litigation. This drastic restriction upon the power of the Government to protect the public interest finds no support in precedent or policy.

In our view, the approach of the court below was wrong. It pointed out first that Chapter X contains an express provision for Commission intervention while Chapter XI does not, and stated that this "raises a strong implication against intervention by the Commission" in Chapter XI proceedings (R. 423). It then addressed itself to the question of whether the interest of the Commission in the litigation was so direct and immediate as to entitle it to intervene *as of right* and held that, since the Commission did not "stand to gain or lose directly by the decision of the court," it did not have such an interest (R. 424). There is no discussion in the opinion of whether the Commission's interest in the action was such as entitled it to intervene *with the permission of the court*. Apparently the court below failed to realize that, since the District Court granted the Commission's motion to intervene, the question was not only whether it

could intervene as of right, but also whether the District Court's action in allowing it to intervene constituted an abuse of discretion.

The reliance of the court below upon the provision of Chapter X expressly providing for Commission intervention is, we believe, misplaced. The purpose of this provision is obviously to allow the Commission properly to perform the advisory functions with which it is charged in Chapter X proceedings. Since the Commission has no similar functions to perform in Chapter XI proceedings, a provision giving it a general right to participate in Chapter XI proceedings would be both inappropriate and superfluous.

The Commission did not intervene here in order to perform advisory functions, but to object against an improper exercise of the court's jurisdiction which, in the opinion of the Commission, nullifies the protection provided by Congress for investors. Its standing to intervene, therefore, does not depend on the provisions of Chapter XI but upon the broad question whether it had sufficient interest to entitle the judge in charge of the proceeding to allow intervention under the general principles governing intervention in the federal courts.

The answer to this question cannot be in doubt. The interest of the Commission in the proceeding is twofold. First, as the agency designated by Congress to participate in Chapter X proceedings "in the interest of adequate representation of the

public interest,"²⁹ it has a very definite interest in objecting, if indeed it is not under a duty to object, on behalf of the investing public against an improper exercise of jurisdiction under Chapter XI which deprives investors of the safeguard contained in Chapter X. Second, it has an equally great interest in protecting its own functions under Chapter X from impairment through improper resort to Chapter XI by corporations which should file under Chapter X.³⁰

This Court has recognized that public officials and administrative commissions, federal and state, have a legitimate interest in resisting any endeavor to evade the provisions of the statutes in relation to which they have official duties. Cf. *Coleman v. Miller*, 307 U. S. 433, 442, 466; *Pennsylvania v. Williams*, 294 U. S. 176.³¹ The *Williams* case is strikingly similar to the present one. There a re-

²⁹ S. Rept. No. 1916, 75th Cong., 3d Sess., p. 33.

³⁰ If the court below were correct in stating that the Commission has no interest to protect until a Chapter X proceeding is pending (R. 423), it would mean that the Commission would never have an opportunity to protest in the interests of the public investors which it represents against an improper resort to Chapter XI which deprived those investors of the protection of Chapter X.

³¹ The preservation of governmental functions from impairment through the improper exercise of jurisdiction has frequently been held by state courts to constitute sufficient basis for an action for a writ of prohibition. See, e. g., *State v. Superior Court for Walla Walla County*, 159 Wash. 335, 293 P. 986 (1930); *State v. Superior Court of Marion County*, 202 Ind. 589, 177 N. E. 322 (1931).

ceivership proceeding was commenced in the federal court. The State of Pennsylvania filed a petition for leave to intervene and for an order directing the receivers to surrender the assets of the defendant association to the State Secretary of Banking for liquidation under the provisions of state law. The District Court denied the petition but this Court reversed, holding that the District Court in the exercise of its discretion should have discharged the receivers and directed the surrender of the property in their possession to the Secretary. The granting of this relief necessarily implied that the state had an interest sufficient to give it standing to intervene.

^cThe majority opinion below attempts to distinguish the *Williams* case on the ground that the state "claimed a right to full possession and control of the assets of the insolvents, not merely a right to advise or protect the public interest" (R. 423-424). The distinction is not substantial. The interest of the state in the receivership proceeding was not a property or possessory interest but an interest in the enforcement of the state liquidation statutes for the protection of the public. That is precisely the type of interest which the Commission has in the present case. That Congress sought to protect the investing public by making the Commission an advisory, rather than a liquidating, agency is immaterial; in each case the administrative body has the same interest in assuring that the

public will receive the protection which the agency was designed to afford it.³²

The decision of this Court in *The Exchange*, 7 Cranch 116, likewise supports the Commission's position. That case involved a libel filed by American citizens against a schooner which the libellants claimed to be their property. The schooner was, in fact, a French vessel of war in possession of French naval officers, although it was within the waters of the United States. After the libel was filed the United States District Attorney filed a "suggestion" setting forth the facts and praying that the schooner be released.³³ The District Court dismissed the libel, but on appeal the Circuit Court reversed. The District Attorney thereupon appealed to this Court, which reversed the judgment of the Circuit Court and affirmed the judgment of the District Court dismissing the libel. The Court, first expressing the opinion that an American citizen cannot assert, in an American court, title to a

³² In *State v. Superior Court of Marion County*, 202 Ind. 589, 177 N. E. 322 (1931), a state banking commissioner was permitted to intervene in an action for a writ of prohibition to prevent a state court from exercising jurisdiction to appoint a receiver for a state bank at the instance of a creditor. The commissioner neither had nor claimed possession of the assets; his "interest" consisted in the fact that he alone was entitled to ask for a receiver.

³³ Although the opinion in *The Exchange* does not speak of intervention, the procedure followed was the same as intervention, if it was not intervention in fact. This Court so recognized in *Stanley v. Schwalby*, 147 U. S. 508, 513.

public armed vessel in the service of a foreign sovereign, added (p. 146): "If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

The course sanctioned by this Court in *The Exchange* was almost identical with the course pursued by the Commission here. There the United States appeared in the proceedings in order to move their dismissal on the ground that the court had no jurisdiction and that an improper exercise of jurisdiction would be contrary to the public interest; its contentions having been overruled in the circuit court, an appeal was allowed. As pointed out in *Percy Summer Club v. Astle*, 110 Fed. 486, 489 (C. C. D. N. H.), *The Exchange* case illustrates that the principle allowing intervention by public authorities where the public interest is concerned "is of the broadest character, and is applied without formalities."³⁴

³⁴ Other cases in which governmental intervention has been allowed cannot satisfactorily be distinguished on the ground that in those cases a claim of title, a pecuniary interest, or a trustee's interest was involved. Those factors are material as establishing the existence of a public interest; they do not limit the character of the public interest which, when otherwise shown to exist, is sufficient to justify intervention. Cf. *Helvering v. Davis*, 301 U. S. 619; *United States v. Minnesota*, 270 U. S. 181, 194; *Norman v. Consolidated Edison Co. of New York*, 89 F. (2d) 619 (C. C. A. 2d); *Winola Lake & Land Co., Inc. v. Gorham*, 17 F. Supp. 75 (M. D. Pa.).

The assumption underlying the decision below that in the absence of statutory provision a governmental agency may not apply to the courts to protect the public interest, as distinguished from its own pecuniary interest, is also directly contrary to the principle enunciated in *In re Debs*, 158 U. S. 564. There the Court upheld the power of the United States to file a bill in equity to enjoin obstruction by the defendant of the interstate transportation of persons and property, as well as of the carriage of the mails; the decision was expressly rested upon the principle that a government entrusted "with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other" and that it is immaterial that the government "has no pecuniary interest in the matter" (p. 584). See also *Hopkins Savings Assn. v. Cleary*, 296 U. S. 315, 339-341.³⁵ A nonpecuniary

³⁵ Cf. *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14, 25, a suit brought to enjoin an order of the Interstate Commerce Commission, in which the Court held that state utility commissions, which had intervened in the suit, were "aggrieved parties" and therefore had a statutory right of appeal "because they officially represent the interest of their states in obtaining adequate transportation service."

The public interest of a state in the maintenance of transportation facilities has been deemed to give it standing to ask for a writ of prohibition forbidding a circuit judge who had entered a decree of foreclosure to confirm the sale of railroad property as junk. *State v. Bullock*, 78 Fla. 321, 82 So. 866, affirmed, 254 U. S. 513.

interest sufficient to support an independent suit for the protection of the public must certainly suffice to support intervention for that purpose in an existing suit. Cf. *New York v. New Jersey*, 256 U. S. 296, 307-308.

The general principles of intervention established by the authorities cited are in no way altered or restricted by Rule 24 of the Federal Rules of Civil Procedure, which this Court has ordered to be followed in bankruptcy proceedings "as nearly as may be." General Orders in Bankruptcy, Paragraph 37. The Advisory Committee's Note to Rule 24 specifically states that the rule "amplifies and restates the present federal practice at law and in equity." The Commission may intervene either under clause (a) (2) of Rule 24, which provides for intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," or under clause (b) (2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."

We submit, therefore, that the Commission had an absolute right to intervene. Its interest in the proceeding is not represented by any other party and that interest will be foreclosed by an adverse judgment, which will effectively prevent the Commission from performing its

functions in relation to the Debtor under Chapter X and will deprive the investors whom the Commission represents of the safeguards provided for them by Congress in Chapter X.³⁶ Since denial of intervention in the present case would leave the Commission without remedy for the impairment of its functions, the Commission comes within the class of applicants for intervention who "can never obtain relief unless it be granted * * * on intervention in the pending cause. In this latter class the right to intervene is absolute * * *." *United States Trust Co. v. Chicago Terminal T. R. Co.*, 188 Fed. 292, 296 (C. C. A. 7th), and cases cited.

But whether or not the Commission had an absolute right to intervene, there can be no question that it was properly permitted to intervene under clause (b) (2) of Rule 24, which merely requires that the intervenor's claim or defense raise a question of law or fact in common with the main action. Here the petition to intervene clearly raised

³⁶ In *United States v. Lane Life Boat Co.*, 25 F. Supp. 410 411 (E. D. N. Y.), it was held that the term "bound" in Rule 24 (a) (2) is not to be strictly construed, even as regards private litigants. Where public agencies are concerned, *Percy Summer Club v. Astle*, 110 Fed. 486, 488 (C. C. D. N. H.), indicates that the condition of the rule that the intervenor be bound by the judgment means merely that the practical effect of an adverse judgment must be "prejudicial."

a question of law in common with the main action, since it was addressed directly to the jurisdiction of the court to maintain the main action. And that a motion to dismiss an action constitutes a "defense" to that action within the meaning of the Rule seems plain; Rule 12 (b) expressly provides that the "defense" of lack of jurisdiction over the subject matter may be presented in a responsive pleading or by motion, at the option of the pleader.³⁷ If it be urged that "defense" refers only to a pleading interposed by one who is technically in the position of the defendant, the short answer is that, so construed, this provision of Rule 24 (b) (2) would not strictly be applicable to anyone seeking to intervene to dismiss a voluntary petition under the Bankruptcy Act, since in such a proceeding no one is ever technically in the position of a defendant. If the Rule is to receive this narrow construction, the result is simply that in a proceeding of this sort the provisions of the Rule may not be applied literally but must rather, as provided by

³⁷ That the words "claim or defense" were not intended to be construed technically is shown by the remarks of Dean (now Circuit Judge) Charles E. Clark at the proceedings of the American Bar Association Institute at Washington, D. C. In describing Rule 24, Dean Clark, after first stating the requirements for intervention of right, stated that permissive intervention may be allowed in "any other case where a question of law or fact in common with the main suit is presented." See Proceedings of the Institute on Federal Rules at Washington, D. C. (Am. Bar. Assn.), p. 67.

Paragraph 37 of the General Orders in Bankruptcy, be followed "as nearly as may be." Plainly, a motion to dismiss a petition filed under Chapter XI for lack of jurisdiction, made by a party having an interest in the proceeding, is the counterpart in bankruptcy proceedings of a similar motion made in an action at law by one who is technically in the position of a defendant.³⁸

2. If the District Court properly exercised its discretion in permitting the Commission to intervene, the Commission had the right to appeal from the orders denying its motions. An interest sufficient to warrant intervention is plainly sufficient to warrant appeal, after intervention, from a decision adverse to that interest. *Pennsylvania v. Williams, supra*; *The Exchange, supra*; *Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104 (C. C. A. 5th), certiorari denied, 302 U. S. 747. As an intervenor, the Commission was a party and the denial of the relief which it sought made it an aggrieved party. As such, it had the

³⁸ The principle that intervention must be in subordination to the main action, formerly embodied in Equity Rule 37, has been omitted from Rule 24 of the Rules of Civil Procedure. The omission was deliberate. See remarks of Dean Clark, in Proceedings of the Institute on Federal Rules at Cleveland (Am. Bar Assn.), pp. 265-266. In the absence of an express requirement of subordination, the Commission was clearly entitled to the relief sought if it was properly permitted to intervene and its position is correct on the merits. *Sage v. Central R. R. Co.*, 93 U. S. 412.

right, under Sections 24 and 25 of the Bankruptcy Act, to take an appeal. Cf. *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14, 24-25; *Williams v. Morgan*, 111 U. S. 684, 696-698; *Savannah v. Jesup*, 106 U. S. 563; *Ex parte Jordan*, 94 U. S. 248; *Sage v. Central R. R. Co.*, 93 U. S. 412, 419.³⁹

³⁹ *Marshall v. Dy*, 231 U. S. 250, cited by the court below (R. 424) is not opposed to this conclusion. That case merely holds that those who seek review of this Court of the judgment of a state court must have a personal as distinguished from an official interest in the relief sought and in the federal right alleged to have been denied by the judgment of the state court. The decision is clearly inapplicable to proceedings in the federal courts because the basis for the rule enunciated was that the petitioner, "having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision" (231 U. S. at 258). It should also be noted that the decision was held to be inapplicable to the situation presented in *Coleman v. Miller*, 307 U. S. 433, 438.

Chicago v. Chicago Rapid Transit Co., 284 U. S. 577, relied upon by respondent, is also inapplicable. That was a suit brought to restrain the Illinois Commerce Commission and the Attorney General of that state from enforcing an order of the Commission prescribing rates of fare upon the plaintiff's railroads. The City of Chicago was permitted to intervene as a defendant. A three-judge District Court granted an injunction and the Commission and Attorney General decided not to appeal. This Court, in a *per curiam* opinion, dismissed an appeal taken by the City of Chicago on the ground that it had no separate standing to appeal. The decision is not authority against the general proposition that an intervenor is a party entitled to appeal from an adverse order. The authorities cited in the opinion in-

The fact, adverted to by the court below, that Section 208 of the Act prohibits appeals by the Commission in Chapter X proceedings, does not, directly or by implication, limit the Commission's right to appeal in this case. The restriction imposed by Section 208 was designed to emphasize the advisory nature of the Commission's functions under Chapter X and the ultimate judicial character of the proceedings (see dissenting opinion of Clark, J., at R. 429). The restriction does not in terms apply to the present case, since this is a Chapter XI rather than a Chapter X proceeding, and the policy reflected by the restriction is likewise inapplicable. The appeal was not taken by the Commission from the confirmation of a plan which it did not deem fair and equitable, but rather from an improper exercise of jurisdiction, based on a vital point of statutory construction, which, in the opinion of the Commission, precludes it from performing the functions vested in it by Chapter X and thereby defeats the public interest which the Commission is directed to protect.

dicte that the basis of the decision was that the regulatory commission, whose order was enjoined and who did not see fit to appeal, rather than the City, was the proper party to determine whether the interests of the public called for review of the decision. The situation here, of course, is not comparable since the Securities and Exchange Commission was the only party in a position to represent the public who could appeal from the decision of the District Court.

CONCLUSION

The judgment of the court below should be reversed and the proceeding remanded to the District Court with instructions to dismiss the Debtor's petition.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

RICHARD H. DEMUTH,
Special Attorney.

CHESTER T. LANE,
General Counsel;

MARTIN RIGER,

SAMUEL H. LEVY,

RAOUL BERGER,

HOMER KRIPKE,

GEORGE ZOLOTAR,

Attorneys,

Securities and Exchange Commission.

APRIL 1940.

APPENDIX

Comparison of provisions of Chapter X and Chapter XI

	Chapter X	Chapter XI
1. Initiation of proceeding.	Debtor, three creditors, or indenture trustee may file petition (Sec. 126).	Only debtor may file petition (Secs. 321, 322).
2. Appointment of trustee.	Trustee appointed in every case in which indebtedness is \$250,000 or more (Sec. 156).	No comparable provision. If trustee in bankruptcy has already been appointed, he must be continued in possession. Otherwise, receiver may be appointed "if necessary" (Secs. 332, 343).
3. Qualifications of trustee.	Must be independent, disinterested (Secs. 156, 158).	No comparable provision.
4. Examination of Debtor's financial problems and causes of failure.	Trustee investigates property, liabilities, and financial condition of debtor, the operation of the business, and the desirability of its continuance (Sec. 167 (5); cf. Sec. 167 (1)).	No comparable provision.
5. Report to judge upon past conduct of the Debtor.	Trustee reports to judge facts pertaining to fraud, misconduct, mismanagement and irregularities, and any causes of action available to estate (Sec. 167 (3)).	No comparable provision.
6. Reports to security holders.	Trustee submits statement of his investigation to security holders (Sec. 167 (5)).	No comparable provision.
7. Formulation of plan.	Trustee gives notice to security holders that they may submit to him suggestions for formulation of plan (Sec. 167 (6)).	No comparable provision.
8. Proposal and filing of plan.	Trustee prepares and files plan (or report of reasons why plan cannot be effected) before debtor may propose plans or amendments (Sec. 169).	Only debtor may propose arrangement (Sec. 323) or modifications (Sec. 323).
9. Assistance of administrative agency.	In cases in which the scheduled indebtedness exceeds \$3,000,000, and in other cases if the judge desires, plans which the judge finds worthy of consideration, after hearing, are submitted to the Securities and Exchange Commission for examination and report (Secs. 172, 173). Commission may, with approval of judge, participate in proceeding as a party (Sec. 208).	No comparable provisions.
10. Submission of plans for acceptances.	After approval by the judge as fair and equitable and feasible, plans are transmitted to security holders together with informative materials, including the judge's opinion and the Commission's report (Secs. 174, 175).	No comparable provision.

	Chapter X	Chapter XI
11. Solicitation of acceptances.	May not normally be solicited until after judge has approved plan and informative materials have been transmitted (Sec. 179).	May be solicited at any time, even prior to institution of proceeding, and must be obtained before court confirms arrangement (Secs. 336 (4), 361, 362). No requirement as to data which must accompany solicitation.
12. Acceptances required for confirmation.	Two-thirds in amount of each affected class of creditors and majority of holders of stock (if debtor is not insolvent) (Sec. 179).	Majority in amount and number of each affected class of unsecured creditors (Sec. 362 (1)).
13. Dissenting classes of creditors or stockholders.	If a class of creditors does not accept by two-thirds in amount, or if a class of stockholders does not accept by a majority, the plan may be confirmed if it provides for such classes adequate protection as prescribed by the statute (Secs. 216 (7), (8), 179, 221).	No comparable provisions.
14. Classes of security holders which plan may affect.	Plan may alter and modify the rights of any class of creditors, secured or unsecured, and of any class of stockholders (Sec. 216).	Arrangement may provide for settlement, satisfaction, or extension of unsecured debts only (Secs. 306 (1), 357).
15. Participation in proceeding by security holders.	Have right to be heard on all matters arising in proceeding (Sec. 206); and may act in person, by attorney, or by agent or committee (Sec. 200).	No comparable provision. One creditors' committee may be elected at first meeting of creditors (Sec. 338).
16. Control over representatives of security holders.	Information furnished to court concerning employment and interests of representatives of security holders (such as committees, indenture trustees and attorneys), as well as interests of the persons represented (Secs. 210, 211). The judge is empowered to disregard provisions in authorizations of such representatives or to restrain the exercise of powers which are unfair or contrary to public policy (Sec. 212). Claims or stock acquired by the representatives in contemplation of or during the course of proceeding may be limited to actual consideration paid therefor (Sec. 212).	No comparable provisions.
17. Indenture trustees.	Have the right to be heard on all matters arising in the proceeding (Sec. 206); to file a claim on behalf of all holders of securities outstanding under their indenture (Sec. 198); and to file a petition initiating the proceeding under the chapter (Sec. 126).	No comparable provisions and no mention of indenture trustees.

	Chapter X	Chapter XI
18. Lists of security holders.	Trustee is under a duty to prepare and file lists of security holders (Sec. 164). Other persons in possession or control of such lists or information relevant thereto may be required to disclose the lists or such information (Sec. 165). Although in a proper case the court may direct impounding of the lists, bona fide security holders and indenture trustees have an unqualified right to use and inspect them upon terms prescribed by the court (Sec. 166).	<i>No comparable provisions.</i> Debtor files bankruptcy schedules with petition (Sec. 324).
19. Compensation and allowances.	In addition to allowances to officers of the court, the debtor and petitioners, the judge has broad power to make reasonable allowances of compensation and reimbursement for expenses to the representatives of security holders, including committees and indenture trustees, and to individual creditors and stockholders and their attorneys. (Secs. 241-242)	The debtor is required to deposit the money necessary "to pay the costs and expenses of the proceedings and the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys and agents of such committee, in such amount as the court may allow" (Sec. 337 (2).)
20. Subsidiary corporations.	A petition by or against a subsidiary corporation may be filed in the same court which has approved the petition by or against the parent corporation. (Secs. 129, 106 (13).)	<i>No comparable provision,</i> and no mention of subsidiaries.
21. Future management.	Plan must contain provisions which are equitable, compatible with the interests of security holders, and consistent with public policy, with respect to the manner of selection of the reorganized company's directors and officers (Sec. 216 (11)); and identity, qualifications, and affiliations of the persons to be directors and officers must be disclosed and meet same test. (Sec. 221 (5).)	<i>No comparable provision.</i>
22. Charter of reorganized company.	Plan must contain provisions requiring inclusion in the reorganized company's charter of provisions for the prohibition of the issuance of non-voting stock, for the equitable distribution of voting power among the new securities possessing such power, for the election of directors representing preferred stockholders in the event of default in payment of preferred dividends, for the general fair and equitable treatment of securities, and for periodic corporate reports to security holders (Secs. 216 (12)).	<i>No comparable provision.</i>

FILED

MAR 28 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

UNITED STATES REALTY AND
IMPROVEMENT COMPANY.

**BRIEF OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.**

✓ JOSEPH M. HARTFIELD,
Counsel for Respondent.

JOSEPH A. BENNETT,
✓ CHARLES W. DIBBELL,
HENRY M. MARX,
of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

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Petitioner,

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UNITED STATES REALTY AND
IMPROVEMENT COMPANY.

**BRIEF OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.**

Opinions Below

The decision of the Circuit Court of Appeals was handed down January 15, 1940 and was filed February 2, 1940. It is reported at 108 F. (2d) 794, and is also contained in the record (R. 420).

The District Court orders (R. 142, 149, 151) from which the appeals were taken to the Circuit Court of Appeals, were entered July 28, 1939 and are unreported. These orders were in effect formal entries of the District Court rulings expressed orally in open court on July 27, 1939 (R. 336-339).

The Questions Presented

It is submitted that the sole issues presented are as follows:

1. Must a District Court refuse to assume jurisdiction over a proceeding for an arrangement under Chapter XI of the Bankruptcy Act, solely because the debtor is a corporation which has securities outstanding in the hands of the public?

2. May the Securities and Exchange Commission be permitted by the District Court to intervene in a Chapter XI proceeding?

3. Irrespective of the answer to question 2, may the Securities and Exchange Commission appeal from orders of the District Court denying the Commission's motion to dismiss the proceeding?¹

Petitioner's question 2 (Petition, p. 2) relating to the fairness, equitability and feasibility of the proposed arrangement is not properly in issue at this time, and was not in issue in the Circuit Court of Appeals, inasmuch as that question can be raised on appeal only after the District Court has itself considered the matter. The District Court has not yet confirmed or disaffirmed the arrangement, which has now been amended, and as amended meets many of the Commission's arguments with respect thereto:

The Statutes Involved

The questions presented on this petition involve primarily Chapters X and XI of the Bankruptcy Act (Sections 101-399; Title 11 U. S. C. Secs. 501-799). Petitioner states (Petition, p. 3) that copies of Chapters X and XI have been filed in their entirety with the Clerk of this

¹ The order of the District Court referring the proceeding to a referee, although technically appealed from, is not really in issue. It seems clear that if the District Court properly assumed jurisdiction of this Chapter XI proceeding, the order of reference was proper. Section 331 of the Bankruptcy Act.

Court, and the Debtor has taken the liberty of referring to such statutes as so filed. Citations of sections of the Bankruptcy Act herein are, unless otherwise indicated, under the numbering in the Act as adopted rather than under the numbering in the United States Code.

Statement of the Case

This is a proceeding instituted by the Debtor on May 31, 1939 for an arrangement under Chapter XI of the Bankruptcy Act, which is now pending in the United States District Court for the Southern District of New York. The Debtor is a New Jersey corporation engaged in the business of owning and operating real estate, with substantial assets and liabilities, and with stock publicly held and listed on the New York Stock Exchange (R. 6, 7, 134).

The factual background of the proceeding may be set forth briefly as follows:

On June 1, 1919, the Debtor's subsidiary, Trinity Buildings Corporation of New York (hereinafter sometimes referred to as Trinity) executed and delivered to Guaranty Trust Company of New York its bond in the amount of \$7,000,000 maturing June 1, 1939, and as security therefor executed and delivered to said Trust Company as Mortgagee its first mortgage covering two New York City office buildings (R. 7, 30). Share certificates in the bond and mortgage were issued by the Mortgagee, and the Debtor executed and delivered to the Mortgagee its guarantee of the principal, interest and sinking fund payments due under said bond and mortgage (R. 7). Although the bond and mortgage were secured, the guarantee was and is a wholly unsecured obligation. The share certificates were sold to the public, and the principal amount thereof outstanding has been reduced to \$3,710,500 by operation of the sinking fund (R. 7).

With the impending maturity of the aforesaid bond and mortgage and guarantee, the Debtor proposed to holders of the share certificates a Modification Plan and

Arrangement, dated March 15, 1939, and subsequently proposed an Amended Modification Plan and Arrangement dated May 1, 1939 (R. 9).

On May 31, 1939 the Debtor filed with the United States District Court for the Southern District of New York its petition for an arrangement under Chapter XI of the Bankruptcy Act (R. 6), and proposed as an arrangement under Section 322 of Chapter XI the aforesaid Amended Modification Plan and Arrangement dated May 1, 1939 (annexed to the Petition as Exhibit B, R. 30-63). The arrangement provided for a modification and extension of the Debtor's above mentioned unsecured guarantee of the bond and mortgage of Trinity maturing June 1, 1939 and for the payment by the Debtor of all of its other debts, secured and unsecured, as they matured (R. 8, 9).

Thus, the proposed arrangement affected only unsecured indebtedness of the Debtor.

The subsequent progress of the proceeding through the decision of the court below, as shown by the various material orders and petitions, motions and other pleadings, is set forth in the record, and a summary thereof is contained in the record (Statement Under Rule 13; R. 1-5).

The proceeding is now pending before a Referee. The Debtor has submitted and the Referee has had hearings on, certain modifications of the proposed arrangement, which as modified has been held by the Referee to be fair and equitable and for the best interests of creditors.²

² The Debtor does not believe factual arguments made by the Commission are relevant; however, it is necessary to deny the repeated references to a purported insolvency of the Debtor, occurring both in the Commission's petition and Judge Clark's opinion. This is not the case as is clearly illustrated by the record. The Debtor is solvent and allegations to the contrary are based on taking into account the Debtor's guarantee as a liability without considering the value of the mortgaged property (the Trinity Buildings) as an asset.

Therefore all arguments based on the doctrine of *Case v. Los Angeles Lumber Products Co. Ltd.*, 308 U. S. 106 (Nov. 6, 1939) are irrelevant. Furthermore, it is submitted that the doctrine of that case does not apply to a Chapter XI proceeding.

ARGUMENT

Summary of Reasons Urged by Debtor for Not Granting the Writ.

The substantive question of jurisdiction has been decided by the court below in accordance with the exact and clear language of the statute, and the principle of statutory construction adopted by the court below is in accordance with principles enunciated by this Court on many occasions.

The procedural questions of the Commission's right to intervene and appeal which have been raised by petitioner are academic, since petitioner has achieved its purpose of having the substantive jurisdictional question considered on the merits both by the District Court and the Circuit Court of Appeals.

I. UNDER THE EXPRESS TERMS OF THE STATUTE, ANY CORPORATION WHICH CAN BECOME A BANKRUPT MAY PROPOSE AN ARRANGEMENT UNDER CHAPTER XI.

There is no ambiguity whatever in the jurisdictional requirements set forth in Chapter XI.

Section 306(3) defines a "debtor" as any person who could become a bankrupt, and Section 306(1) defines an "arrangement" as a plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. Section 1(23) provides that "persons" shall include corporations, and Section 4 provides that any person except a municipal, railroad, insurance, or banking corporation or a building and loan association may become a bankrupt.

Sections 322 and 323 authorize a debtor wishing to effect an arrangement to file a petition setting forth the proposed arrangement. The arrangement must modify or alter the rights of unsecured creditors generally or of some class of them (Section 356).

That the Debtor is entitled, under Section 4 of the

Bankruptcy Act, to become a bankrupt, has not been questioned and is not open to argument. Accordingly, petitioner admits that the statute, read "literally", permitted the Debtor to proceed under Chapter XI (Petition, p. 9).

As for the authorities, the decision below is one of first impression in the Circuit Courts of Appeals. The only square holding by a District Court other than in this proceeding was in accord with the decision below. *In re Credit Service, Inc.*, 30 F. Supp. 878 (D. Ct. D. Md. 1940). Another District Court in a dictum expressed contrary views, which might be said to support the contention of the Commission. *In re Reo Motor Car Co.*, 30 F. Supp. 785 (D. Ct. E. D. Mich. 1939).

A. Where a statute is clear and unambiguous, the courts may not enlarge or modify its meaning by construction.

In the words of Mr. Justice Frankfurter in *Palmer v. Massachusetts*, 308 U. S. 79 at p. 83 (November 6, 1939):

"* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."

This Court has generally refused to depart from the exact wording of an unambiguous statute. *United States v. Missouri Pacific Railroad Company*, 278 U. S. 269 (1929); *Iselin v. United States*, 270 U. S. 245 (1926); *Wallace v. Cutten*, 298 U. S. 229 (1936). This has even been done in cases imposing a tax or a penal liability. *Helvering v. City Bank Farmers Trust Company, Trustee*,

296 U. S. 85 (1935); *Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).

The Commission argues that, if Chapter XI is not construed so as to exclude publicly owned corporations from acting thereunder, the public protection safeguards of Chapter X will be ineffective and meaningless. However, this type of argument has been rejected by this Court where the statute "expresses an intention reasonably intelligible and plain." *Thompson v. United States*, 246 U. S. 547 (1918). It is not for the courts through judicial decision but for Congress through legislation to express public policy.

This Court, under the foregoing general principle, has disregarded statements in Committee Reports when it deemed the statute clearly contrary to such statements. *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *Helvering v. City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935). Of course, in the instant case, as will be shown briefly hereafter, there is no evidence of any Congressional intent that Chapter XI should be read otherwise than in accordance with its literal terms.

- B. In any event, there is no evidence, either from the historical derivation of Chapter XI, or in Committee Reports or proceedings, of any Congressional intent to preclude corporations with publicly held securities from proceeding under Chapter XI.**

• The Historical Derivation of Chapter XI.

Chapter XI is derived in part from former Section 12 of the Bankruptcy Act, which was the old composition section. Section 12, although unquestionably used principally by individuals (and partnerships) was available to corporations, and in fact it was actually used by corporations. See cases cited under former Section 12 (11 U. S. C. A. Sec. 30).

Furthermore, in at least two of the corporate cases compositions were effected in respect of indebtedness which was held by the public. Thus, in *In re Realty Associates Securities Corp.* (citations *infra*) a large corporation (total creditors' claims of more than \$12,000,000) made a composition in respect of bonded indebtedness which was held by over 3,000 bondholders. No question was raised as to the validity of the corporation's acting under Section 12, although problems arising in this composition were twice before the Circuit Court of Appeals for the Second Circuit and twice before the Supreme Court. *In re Realty Associates Securities Corp.*, 69 F. (2d) 41 (C. C. A.-2d, 1934), cert. den. 292 U. S. 628 (1934). The same composition was also considered in 6 F. Supp. 549 which was modified in 74 F. (2d) 6 but confirmed in 295 U. S. 295 (1935). See also *In re O'Gara Coal Co.*, 260 Fed. 742 (C. C. A.-7th, 1919).

The derivation of Chapter XI from Section 12 indicates that Congress intended to make Chapter XI available to the same types of corporations which could formerly act under Section 12. Chapter XI is a proceeding for a composition or settlement; Chapter X for a complete reorganization. The Debtor's proposed arrangement is a composition, and is strikingly similar to that effected in the *Realty Associates* case.

The derivation of Chapter XI from former Section 12 also shows that an arrangement (composition) need not disturb ownership of the equity interest (stock ownership). Section 12 compositions always contemplated that the equity interests should retain their position.

The Congressional Proceedings.

The question of *limiting* the application of Chapter XI to small, closely held corporations does not appear to have been discussed in the entire legislative history of the Chandler Act.

The only statement in the Committee Reports is that on page 51 of the House Report³:

"The inclusion of corporations (in Chapter XI) will *permit* a large number of the smaller companies such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12." (The Senate Report⁴ refers generally to the House Report, but does not otherwise contain any statement whatever on the point.)

This quotation is revealing in showing (1) that the Committees had in mind primarily the fact of *permitting* small companies to come under Chapter XI and not the matter of *excluding* other companies, and (2) that one of the primary reasons for Chapter XI was to relieve the burden of courts hearing unnecessary 77B (Chapter X) proceedings. Such reasons are entirely compatible with permitting large, publicly owned corporations also to take advantage of the composition provisions of Chapter XI. In fact, the Bankruptcy Act expressly provides that Chapter X is not available to a debtor in cases where Chapter XI is available. Section 130(7).

In addition, whereas in Chapter X, careful standards of size are set up for the application of certain provisions thereof, no such standards appear in Chapter XI. It would be impossible for the courts to set up such standards without infringing on the legislative field of Congress.

The Commission participated actively in the preparation of the 1938 amendments of the Bankruptcy Act, containing as new Chapters, both X and XI; if it had at the time been intended that Chapter XI be unavailable in the instant type of situation, it would have been a simple matter, *with the necessary consent of Congress*, to include such a restriction in the statute.

³ H. Rept. No. 1409 on H. R. 8046, 75th Cong., 1st Session.

⁴ S. Rept. No. 1916 on H. R. 8046, 75th Cong., 1st Session.

C. There is no public interest requiring the construction of Chapter XI urged by petitioner.

For many years, judicial supervision (in addition to the self-interest of the parties) was the sole regulatory measure used in reorganizations and readjustments. An arrangement under Chapter XI is essentially merely a composition, rather than a complete reorganization and readjustment of interests in a corporation. There seems no reason for the courts to require more than judicial supervision when Congress required no more.

II. THE SECURITIES AND EXCHANGE COMMISSION HAS NO RIGHT TO INTERVENE IN A PROCEEDING UNDER CHAPTER XI, EVEN WITH THE PERMISSION OF THE COURT.

The Commission has urged that it should have been permitted to intervene in the proceedings below, and that the order of the Circuit Court of Appeals denying it the right to do so was of such public importance that the matter should be reviewed by this Court.

For the reasons pointed out on pages 12-14 of this brief, this question seems of no present significance. Accordingly, the Debtor will confine its argument on this point to a very brief statement.

A. The Commission is a statutory body with limited authority, and no statute authorizes the Commission to participate in a Chapter XI proceeding.

It is an established principle that governmental agencies created by statute have no authority except such as is specifically granted them by statute.⁵ *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643 (1931); *Davis*

⁵ Mr. Justice Douglas, when Chairman of the Securities and Exchange Commission stated, "The administrative agency has no powers but the powers granted in the statute." (Address made October 26, 1938, printed in *Report of the Eighth Annual New York Herald Tribune Forum on Current Problems.*)

v. *Rochester Can Company*, 220 A. D. 487 (1927), affirmed without discussion as *Mellon v. Rochester Can Company*, 247 N. Y. 521 (1928); *Throop on Public Officers* (1892), Section 556.

Chapter XI makes no reference to the Commission, although Chapter X specifically grants a limited authority to the Commission. There is no other statute which either directly or impliedly gives the Commission authority to participate in a Chapter XI proceeding.

- B. The Committee is not entitled to intervene either as of right or by permission within Rule 24 of the Federal Rules of Civil Procedure, and in any event may not intervene to impeach a decree already made.**

We refer to the portion of the opinion of the court below (R. 423-424) which deals with right of intervention, and submit that the Court was correct in its reasoning and conclusion therein set forth. The cases cited by the Commission involve either property interests or an express statutory authority or no intervention at all.

III. THE SECURITIES AND EXCHANGE COMMISSION HAS NO STATUS TO APPEAL FROM THE ORDERS OF THE DISTRICT COURT.

As in the intervention question raised by petitioner, the Debtor believes that the question of appeal does not warrant review by this Court on certiorari. The Debtor's very brief argument follows.

- A. Chapter XI does not authorize such an appeal and Chapter X expressly denies it in an analogous situation.**

Section 208 of the Bankruptcy Act (Chapter X) expressly provides that the Commission shall have no right of appeal from orders of the District Court. If the Commission, which has affirmative functions to perform in

Chapter X, cannot appeal from Chapter X orders, it would seem strange indeed to permit appeals in Chapter XI, where the Commission is not even mentioned. Furthermore, since the Commission may not, under Section 208, appeal from an order denying a Chapter X petition on the ground that the remedy under Chapter XI is adequate, why should it be permitted to appeal from an original order approving the filing of and adequacy of a Chapter XI petition?

- B. The Commission is not a proper party to appeal within Sections 24 and 25 of the Bankruptcy Act or within general principles requiring appellant to have an interest in the proceeding.**

For its amplification of this argument Debtor merely refers to Sections 316, 24 and 25 of the Bankruptcy Act and to the opinion of the court below (R. 425) that the Commission's appeals "should be dismissed because the Commission is not aggrieved by the orders appealed from; it has no interest that is affected by the litigation." If the proceeding is valid the Commission concededly has no interest therein; if invalid, the proceeding is a nullity.

IV. NO REASONS OF PUBLIC INTEREST REQUIRE THIS COURT TO REVIEW THE ACTION OF THE COURT BELOW.

For the purpose of considering whether this Court should grant the petition for certiorari, the decision of the Circuit Court of Appeals should be subdivided into (1) its holding on the substantive question of whether the District Court could assume jurisdiction of a Chapter XI proceeding instituted by a corporation with publicly held securities, and (2) its holdings on the procedural questions of intervention and appeal.

A. The procedural questions of intervention and appeal are academic at this time, inasmuch as the Commission has already achieved its purpose of having the substantive jurisdictional question considered on appeal.

It seems clear that the holdings on the procedural points are not, in and of themselves, of sufficient public importance and interest to warrant review or certiorari. The Commission's motion for leave to intervene was admittedly solely for the purpose of moving the court (a) to dismiss the Debtor's petition, (b) to deny confirmation of the Debtor's arrangement, and (c) to dismiss the proceeding (R. 133). The Commission made a motion (R. 145) covering the matters set forth in its petition for leave to intervene, and the court expressly considered the matters and made its rulings thereon (R. 149). Accordingly, so far as the District Court was concerned, the Commission completely achieved its purpose in intervening, namely to challenge jurisdiction. Furthermore, on appeal, even though the Circuit Court dismissed the Commission's appeals, it expressly considered and ruled upon the substantive question of jurisdiction. The fact that the Circuit Court reversed the District Court's order granting leave to intervene was immaterial, since in practical result, all purpose of intervention, namely, to have an authoritative adjudication of the substantive issue, had already been achieved.

B. The substantive question depends upon the construction of a statute admittedly unambiguous in language, and the court below decided the question in accordance with general principles of statutory construction frequently approved by this Court.

The substantive question involved, and the only question which, in the opinion of the Debtor, could conceivably justify review by this Court, is the question of whether the District Court should have denied the Debtor the remedy

of Chapter XI solely because its securities are held by the public.

The Commission admits that the court below, in holding that the District Court properly assumed jurisdiction of the proceeding, read the statute with literal exactness (Petition, p. 9). As shown above, the statute was not only unambiguous but reasonable. Under these circumstances, the court below, in refusing to follow the intricate reasoning of the Commission, which was not justified by either the wording of the statute, or its historical derivation, or any statements in the Committee Reports, was merely following the authoritative line of decisions of this Court. Therefore, no review by certiorari seems warranted.

Conclusion

No sufficient public interest has been shown to warrant review of either the procedural or substantive questions considered below, and the petition of certiorari should be denied.

Dated: New York, N. Y., March 27, 1940.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Respondent.

JOSEPH A. BENNETT,
CHARLES W. DIBBELL,
HENRY M. MARX,
of Counsel.

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APR 24

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT

✓ JOSEPH M. HARTFIELD,
Counsel for Respondent.

✓ JOSEPH A. BENNETT,
✓ CHARLES W. DIBBELL,
✓ HENRY M. MARX,
of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the Circuit Court of Appeals is reported at 108 F. (2d) 794, and is also contained in the record (R. 420).

The District Court orders (R. 142, 149, 151) from which the appeals were taken to the Circuit Court of Appeals, were entered July 28, 1939 and are unreported. These orders were in effect formal entries of the District Court rulings expressed orally in open court on July 27, 1939 (R. 336-339).

Jurisdiction of this Court

This Court on April 1, 1940 assumed jurisdiction of this proceeding by granting the petition of the Securities and Exchange Commission for a writ of certiorari. Juris-

diction was claimed under Section 240(a) of the Judicial Code [Title 28, U. S. C., Sec. 347(a)].

The Questions Presented

It is submitted that there is only a single issue presented:

Must a District Court refuse to assume jurisdiction over a proceeding for an arrangement under Chapter XI of the Bankruptcy Act, solely because the debtor is a corporation which has securities outstanding in the hands of the public?

However, since the Commission in its brief has argued the questions of its right to intervene and appeal, we shall also discuss these issues, but briefly.¹

Petitioner's question 2 (Petitioner's Brief, p. 2), relating to the fairness, equitability and feasibility of the proposed arrangement, is not properly in issue at this time, and was not in issue in the Circuit Court of Appeals, inasmuch as that question can be raised on appeal only after the District Court has itself considered the matter. The District Court has not yet confirmed or refused to confirm any arrangement.

¹As a practical matter, in this particular proceeding the questions of intervention and right of appeal are now academic. The purpose of intervention was solely to challenge the jurisdiction of the District Court by appropriate motion, and to obtain the right to appeal from an order denying the Commission's motion. (R. 133, 143, 366). By having the jurisdictional question considered fully on the merits both by the Circuit Court of Appeals and by this Court, the Commission has obtained the full object of its intervention and appeal. Accordingly, it is not essential for this Court to decide whether the Commission had a right to intervene and appeal. The Debtor believes, however, that the court below was correct in holding that the Commission had no right of intervention and no right to appeal.

The order of the District Court referring the proceeding to a referee, although technically appealed from, is not really in issue. It seems clear that if the District Court properly assumed jurisdiction of this Chapter XI proceeding, the order of reference was proper. (Bankruptcy Act, Section 331.)

The Statutes Involved

The questions presented on this petition involve primarily Chapters X and XI of the Bankruptcy Act (52 Stat. 840, Sections 101-399; Title 11 U. S. C. Secs. 501-799). Petitioner states (Petitioner's Brief, p. 3) that copies of Chapters X and XI have been filed in their entirety with the Clerk of this Court; and the Debtor takes the liberty of referring to such statutes as so filed.

Statement of the Case

This is a proceeding instituted by the Debtor on May 31, 1939 for an arrangement under Chapter XI of the Bankruptcy Act, which is now pending in the United States District Court for the Southern District of New York. The Debtor is a New Jersey corporation engaged in the business of owning and operating real estate, with substantial assets and liabilities, and with stock publicly held by some 7,000 stockholders and listed on the New York Stock Exchange (R. 6, 7, 134).

The factual background of the proceeding may be set forth briefly as follows:

On June 1, 1919, the Debtor's subsidiary, Trinity Buildings Corporation of New York (hereinafter sometimes referred to as Trinity) executed and delivered to Guaranty Trust Company of New York as Mortgagee its bond in the amount of \$7,000,000 maturing June 1, 1939, secured by a first mortgage covering two New York City office buildings in the financial district (R. 7, 30). Share certificates in the bond and mortgage were issued by the Mortgagee, and the Debtor executed and delivered to the Mortgagee its guarantee of the principal, interest and sinking fund payments due under said bond and mortgage (R. 7). Although the bond and mortgage constitute secured indebtedness, the guarantee was and is a wholly unsecured obligation. The share certificates were sold to

the public, and the principal amount thereof outstanding has been reduced to \$3,710,500 by operation of the sinking fund (R. 7) and are held by some 900 holders (R. 10).

With the impending maturity of the aforesaid bond and mortgage and guarantee, the Debtor and Trinity jointly proposed to holders of the share certificates a Modification Plan and Arrangement, dated March 15, 1939, and subsequently proposed an Amended Modification Plan and Arrangement, dated May 1, 1939 (R. 9).

On May 31, 1939 the Debtor filed with the United States District Court for the Southern District of New York its petition for an arrangement under Chapter XI of the Bankruptcy Act (R. 6), and proposed as an arrangement the aforesaid Amended Modification Plan and Arrangement dated May 1, 1939 (annexed to the Petition as Exhibit B, R. 30-63). The arrangement provided for a modification and extension of the Debtor's above mentioned unsecured guarantee of the bond and mortgage of Trinity maturing June 1, 1939 and for the payment by the Debtor of all its other debts, secured and unsecured, as they matured (R. 8, 9).² Under this arrangement, provision was made for payment in full of the principal of the share certificates and for substantially full payment of interest before stockholders are entitled to receive anything.

Thus, the proposed arrangement affects only unsecured indebtedness of the Debtor.

The subsequent progress of the proceeding to the date of the decisions of the court below appealed from, as shown by the various material orders and petitions, motions and other pleadings, is set forth in the record, and a summary

²The Amended Modification Plan and Arrangement provided for a similar modification of Trinity's mortgage indebtedness, and in connection therewith provided for institution of proceedings in the New York Supreme Court under the New York Burchill Act (N. Y. Real Property Law, Secs. 121-123). The Plan and Arrangement of May 1, 1939 has now been amended.

thereof is contained in the Statement Under Rule 13 (R. 1-5).

The proceeding is now pending before a Referee. As stated above, the Debtor has submitted certain modifications of the proposed arrangement.³

In connection with the intervention of the Commission, the Debtor wishes to point out that it never objected to the Commission appearing in the District Court proceeding as an *amicus curiae* for the purpose of advising the Court on the arrangement (R. 314-316). The District Court Judge expressly stated that he was glad to have the Commission appear at all times for the purpose of advising him and that he would recommend that the Referee adopt the same attitude (R. 360-1). Accordingly, it is clear that no attempt was ever made by anyone to prevent the District Court from having the "informed, independent judgment" which is emphasized by the Commission in its brief (Petitioner's Brief, p. 20).

Before concluding our statement of facts we wish to emphasize that the Commission has asserted (R. 136-137, 325-327) that, if no securities of the Debtor were publicly held, Chapter XI would be available to it in the case at bar, but since securities of the Debtor are publicly held (although

³We submit that the factual arguments as to the financial condition of the Debtor and of Trinity are irrelevant. However, we wish to emphasize that the Debtor is not insolvent in the bankruptcy sense even considering its contingent liability on the guarantee at the full face amount thereof. An officer of the Debtor testified that as of June 1, 1939 its assets were worth \$7,076,515.92 (R. 226). This figure was based upon including the Debtor's interest in Trinity at no value for the reason that it was the officer's opinion that the Debtor could not realize anything on that investment at this time (R. 190). This estimate was, of course, based upon offsetting the value of the Trinity buildings against the amount of the Debtor's guarantee of the Trinity mortgage. The fair market value of the mortgaged premises of Trinity is believed to be well in excess of the amount of the mortgage (and guarantee) (R. 32). Accordingly, if the value of the Debtor's interest in Trinity is considered as zero, the amount of the guarantee cannot be added to the liabilities of the Debtor. The total amount of the Debtor's liabilities as of June 1, 1939 was \$5,476,500 (R. 228) and, therefore, the Debtor is solvent.

no such provision or inference is found in the statute) the Debtor should be forced to institute the unnecessary, expensive, and lengthy proceeding outlined under Chapter X of the Bankruptcy Act. The Commission in short wishes to force the Debtor to effect a complete reorganization rather than permit it to employ a remedy expressly made available by the Act, to effect an arrangement, namely, a composition with one class of its unsecured creditors.

SUMMARY OF ARGUMENT

I.

The Commission contends that a corporation with securities outstanding in the hands of the public cannot proceed under Chapter XI. It is submitted that this conclusion is clearly erroneous, inasmuch as any corporation which can become a bankrupt may by the express terms of the statute institute a proceeding under Chapter XI, which contains no requirement that the debtor's securities shall not be publicly held. The statute is entirely reasonable and is so clear and unambiguous that the courts are powerless to enlarge or modify its meaning under the guise of a "construction" thereof. Under the provisions of the Act the Debtor could not file a petition under Chapter X unless it could affirmatively show that it could not obtain relief under Chapter XI (Sections 130, 146, 147).

Even if this were a proper case for "construction," neither from the testimony before the Congressional Committees which considered the Chandler Bill, nor in the Committee Reports, nor from the factual background and historical derivation of Chapter XI, nor from the structure of the Bankruptcy Act, can there be found evidence of any intent of Congress to prohibit corporations with publicly held securities from proceeding under Chapter XI. In fact the evidence is to the contrary.

II.

The fairness, equitability and feasibility of any arrangement is not properly in issue at this time, inasmuch as the District Court has not yet confirmed or refused to confirm any arrangement.

III.

It is clear that this Debtor can propose an arrangement which meets the requirements of Chapter XI. The arrangement originally filed, which is to so great an extent the object of the Commission's objections, has been amended in substantial respects and is no longer even before the District Court.

We submit that *Northern Pacific Railway Co. v. Boyd*⁴ and *Case v. Los Angeles Lumber Products Co., Ltd.*⁵ do not apply to a proceeding instituted under Chapter XI for a settlement of unsecured debts. The use of the phrase "fair and equitable" in both Chapters X and XI is not significant, since the same words may have different meanings in different parts of the same statute. That phrase is employed in all the debtor-relief chapters of the Bankruptcy Act, and it is obvious that it cannot have the meaning ascribed to it in the *Boyd* and *Los Angeles* cases in chapters such as Chapter XIII, which applies to compositions and extensions of indebtedness of wage earners. However, even if such doctrine were held to be applicable, it is clear that an arrangement which is fair and equitable thereunder can be proposed by the Debtor in this proceeding.

IV.

The Securities and Exchange Commission has no power or authority to intervene in a proceeding under Chapter XI even with the permission of the Court. The Commission is

⁴ 228 U. S. 482 (1913).

⁵ 308 U. S. 106 (Nov. 6, 1939).

a statutory body with limited authority and no statute authorizes its participation in a Chapter XI proceeding. Such participation is ultra vires the Commission. Furthermore, the Commission is not entitled to intervene either as of right or by permission of the Court within Rule 24 of the Federal Rules of Civil Procedure.

V.

The Commission has no status to appeal from the orders of the District Court. Chapter XI does not authorize such an appeal and Chapter X expressly denies it in an analogous situation. Furthermore, the Commission is not a proper party to appeal within Sections 24 and 25 of the Bankruptcy Act or within the general principles requiring an appellant to have a real interest in the proceeding.

I.

UNDER THE EXPRESS TERMS OF THE STATUTE, ANY CORPORATION WHICH CAN BECOME A BANKRUPT MAY PROPOSE AN ARRANGEMENT UNDER CHAPTER XI.

There is no ambiguity whatever in the jurisdictional requirements set forth in Chapter XI.

Section 306(3) defines a "debtor" as any person who could become a bankrupt, and Section 306(1) defines an "arrangement" as a plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. Section 1(23) provides that "persons" shall include corporations, and Section 4 provides that any person except a municipal, railroad, insurance, or banking corporation or a building and loan association may become a bankrupt.

Sections 322 and 323 authorize a debtor wishing to effect an arrangement to file a petition setting forth the proposed arrangement. The arrangement must modify or

alter the rights of unsecured creditors generally or of some class of them (Section 356).

That the Debtor is entitled, under Section 4 of the Bankruptcy Act, to become a bankrupt, has not been questioned and is not open to argument. Accordingly, the Commission admits that the statute, read "literally", permitted the Debtor to proceed under Chapter XI (Petitioner's Brief, p. 13).

The omission of any restriction on the types of corporate debtors which may avail themselves of Chapter XI is self-evident and has been the subject of a great deal of discussion.⁶

The fact that Chapter X, which was enacted simultaneously with Chapter XI, contains express classifications of corporations based on size (Secs. 156, 159, 172) and Chapter XI contains no such classification also affords a compelling inference that no classification of different types of corporations was even remotely intended under Chapter XI. However desirable the classification proposed by the Commission might be thought to be, there is no warrant for it in the language or history of the statute.

⁶ Heuston, *Corporate Reorganization under the Chandler Act*, 38 Colum. L. Rev. 1199, at page 1201, note 8; Rostow and Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 Yale L. J. 1334.

Mr. John Gerdes, author of *Gerdes on Corporate Reorganizations* (1936) was a participant in the drafting of the 1938 amendments to the Bankruptcy Act. Speaking at the annual conference of the National Association of Referees in Bankruptcies on August 22, 1938, he was presented with the question: "What is the line of demarcation between proceedings under Chapter X and Chapter XI?" He replied, "Without attempting to go into detail, Chapter XI proceedings are intended for the reorganization of corporations with simple debt structures—reorganizations under which the interests of stockholders and secured creditors are not to be modified or readjusted. If secured claims or stock interests are to be changed without the consent of all of the stockholders and secured creditors, proceedings must be instituted under Chapter X." *Journal of the National Association of Referees in Bankruptcy* (January, 1939, p. 72).

As for the authorities, the decision below is one of first impression in the Circuit Court of Appeals. The only square holding by a District Court other than in this proceeding was in accord with the decision below: *In re Credit Service, Inc.*, 30 F. Supp. 878 (D. Ct. D. Md. 1940). Another District Court in a dictum expressed views which are claimed by the Commission to support its contentions. *In re Reo Motor Car Co.*, 30 F. Supp. 785 (D. Ct. E. D. Mich. 1939).⁷

A. Where a statute is clear and unambiguous the courts may not enlarge and qualify its meaning by construction.

We have shown and the Commission has admitted (Petitioner's Brief, p. 13) that the Bankruptcy Act, read literally, permitted the Debtor to proceed under Chapter XI. We shall show hereinafter that a literal reading also achieves an entirely reasonable result.

⁷ The issue in the *Reo* case, however, was whether a Chapter X proceeding which was in the final stages of completion should be transferred to Chapter XI on motion of an obstructionist management group which had originally caused the Chapter X proceedings to be instituted. Furthermore, the *Reo* case is distinguishable from the case at bar because the proposed *Reo* plan provided for a change of capital stock of the debtor, which could be accomplished under Chapter X but not under Chapter XI.

The case of *In re McKesson & Robbins, Inc.*, In Proceedings for Reorganization, No. 72697 (S. D. N. Y.) is also a case where the issue was simply whether the petition had properly been filed under Chapter X. From a consideration of the record in that case, it seems clear that the court did not even inferentially pass upon the issue presented here (See Minutes for Hearing held December 27, 1938). The court in fact emphasized that not the legal, but the "practical" situation (particularly the advisability, under the circumstances of criminal falsification of books which achieved nation-wide publicity, that there be an independent single trustee) called for a Chapter X rather than a Chapter XI proceeding. Furthermore, in that case, the falsification of records would be a bar to the discharge of the company as a bankrupt under Section 14 of the Act, and this in turn would prevent the confirmation of an arrangement under Chapter XI (Section 366).

It is a fundamental principle of statutory construction that where there is no ambiguity in the language of a statute, there is no room for construction.

The reasons why the specific terms of a clearly worded statute should be followed without any attempt to "construct" them have been stated in compelling language by this Court in *Palmer v. Massachusetts*, 308 U. S. 79 at p. 83 (Nov. 6, 1939):

"* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."

In *United States v. Missouri Pacific Railroad Company*, 278 U. S. 269 (1929), this Court, in holding that an order of the Interstate Commerce Commission establishing a through route over the lines of the plaintiff and the connecting lines of another road was beyond the statutory authority of such Commission, stated on pages 277-278:

"* * * The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes.

Construction may not be substituted for legislation. * * *

In *Iselin v. United States*, 270 U. S. 245 (1926) involving the taxability of proceeds of the sale of certain Metropolitan Opera House tickets which Miss Iselin received free as a stockholder of the Opera Corporation, this Court held that the statute did not apply to sale of tickets of the type in question, stating on pages 250-251:

"* * * The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

Wallace v. Cutten, 298 U. S. 229 (1936) involved Section 6(b) of the Grain Futures Act, which authorized a Commission to order all Contract Markets (Produce Exchanges) to refuse trading privileges to any person "who is violating" the act or regulations thereunder, or who "is attempting" to manipulate the market price of grain contrary to the provisions of the Act. The Court held that this section did not apply to *past* violations, which were committed two years before proceedings by the Commission were begun. This result was reached even though Section 6(a) of the Act in providing for the punishment of Contract Markets for violations of the Act, used the phrase "has failed or is failing" to comply with the Act. The opinion of this Court contains the following language at pages 236 and 237:

"The Government argues that, since violations of the reporting requirements by their very nature cannot be detected during the course of commission, the literal construction thus given to Sec. 6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of

the provisions of the Act or attempt to manipulate the market price of grain. Incidents in the history of the legislation are cited to support the Government's contention. . . .

"It would be inappropriate for us to discuss these, and other, arguments presented. The language of Sec. 6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress."

The principle enunciated in the foregoing cases is by no means confined to criminal and tax statutes, although the Commission has attempted to distinguish *Igelin v. United States* and *Wallace v. Cullen* on this ground. In any event, we may assume that the point of the Commission's attempted distinction of those cases is the argument that the court used this principle to support a strict construction of a tax or penal statute in favor of the taxpayer or accused person.⁸ However, this Court has also imposed penalties with the statement that, "in penal statutes, as well as in those of a different character, 'if the language be clear, it is conclusive'." *Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).⁹ The following language of the Court at pages 100-101 is also noteworthy, in view of the Commission's argument that an additional qualification must be read into Chapter XI, although not written there, viz. that only a small, privately owned corporation may act under such chapters:

"* * * Nothing can be plainer than that a ship which enters one of our ports has come to the United States; and a passenger on board obviously has come with the ship, and consequently has been

⁸ It should be noted that this same distinction would apply to all except one of the cases cited by the Commission in support of its argument against a literal construction of the Act (Petitioner's Brief, page 14).

⁹ For a case where the principle was enunciated in requiring payment of a tax, see *Helvering v. City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935), *infra* p. 15.

brought by the ship to the United States. And this remains none the less the fact, although the ship continue on her way to a foreign port, and although it was intended that the passenger should go with her, and not be left in the United States. To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction. * * *

The Commission argues that, if Chapter XI is not construed so as to exclude publicly-owned corporations from acting thereunder, the provisions of Chapter X will be ineffective and meaningless. However, this type of argument has been rejected by this Court where the statute "expresses an intention reasonably intelligible and plain." *Thompson v. United States*, 246 U. S. 547, 551 (1918). It would have been a simple matter, had Congress so intended, specifically to preclude publicly owned corporations from acting under Chapter XI and thus to provide for public investors what the Commission terms "the protection of the safeguards" of Chapter X (See Petitioner's Brief, p. 24).

Chapter XI by plain, direct language established a different procedure, remedy, safeguards and relief from those provided for in Chapter X. The Debtor's proceeding meets all jurisdictional requirements of Chapter XI, and the District Court so held in finding the Debtor's original petition properly filed under Section 322 and in the orders from which the Commission has appealed. In addition, it by no means follows that what the Commission calls "necessary machinery" for a reorganization under Chapter X is necessary for an arrangement (composition) under Chapter XI. The machinery which is "necessary" can only be prescribed by Congress.

Where the statute is deemed clear by the Court, express statements in Committee Reports leading to a contrary construction have been disregarded. In *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932) the question was whether the Food and Drugs Act authorized the establishment (by administrative officers) of rules and regulations in respect of weight and measure variations or merely in respect of "tolerances and exemptions." The Court, in holding that the clear and natural meaning of the statute permitted the establishment of regulations for variations as well as for tolerances and exemptions, stated at p. 83:

—“Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill [which afterwards became the act in question (H.R. 850, 62d Cong., 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S.R. 1216, 62d Cong., 3d Sess., pp. 2-4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. * * *”

Likewise, an inference from a Committee Report was overridden in view of language in the statute deemed by the Court to be clearly to the contrary, in *Helvering v. City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935):

Of course, essentially the question of whether the Court believes that the statute is so clear as to call for the application of the foregoing principles depends upon the particular statute in question. Statutory construction deals with particular statutes, not theoretical principles. Ac-

cordingly the Commission has cited several cases in its brief where in specific instances this Court refused to make a literal application of a statute when the Court believed that this would nullify the intent and clear purpose of Congress (Petitioner's Brief, pages 13-14).

We agree with the decisions in those cases in view of the clear contrary intent of Congress. Thus, in *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892), the principal case relied on by the Commission, one of the Congressional Reports expressly stated that its interpretation of the bill was in accordance with the interpretation subsequently made by this Court.¹⁰

In the instant case, we submit that there is no evidence whatsoever of any intention of Congress to prohibit the use of Chapter XI by corporations with publicly held securities. For a court so to hold would constitute judicial legislation.

B. There is no evidence of any Congressional intent to prohibit corporations with publicly held securities from proceeding under Chapter XI, but there is evidence to the contrary.

As shown above (pages 10 to 16), the history of legislation may not be invoked where the language of the statute is clear. However, it is submitted that even the legislative history and factual background of Chapter XI do not support the contention of the Commission, but do support that of the Debtor.

In support of this statement we will discuss briefly first, the Congressional proceedings on the Chandler Bill itself, H. R. 8046, consisting of the testimony before the Congressional Committees and the Reports of the House and Senate Committees on that bill; second, the factual conditions existing at the time the bill became law, includ-

¹⁰ Furthermore, in that case this Court found principles of religious freedom at stake and devoted a large portion of its opinion to the religious phase of the case.

ing statements in the reports of investigating committees and agencies which were considered by Congress in enacting the law; and third, the structure of the Act, with a comparison of the various debtor relief sections and their relation to the previously existing sections of the Bankruptcy Act.

The testimony before the Congressional Committees which considered the Chandler Bill.

The testimony of various witnesses before the House Judiciary Committee shows that the Chandler Bill was sponsored by the National Bankruptcy Conference, a more or less informal group consisting of representatives of the American Bar Association, certain local bar associations, referees in bankruptcy, representatives of credit associations and others. In addition the Securities and Exchange Commission sponsored many of the provisions of the Bill. (Hearings before the House Judiciary Committee on H. R. 6439, subsequently reintroduced and reported as H. R. 8046, 75th Cong. 1st Sess., pp. 2-3.)

Testimony with respect to Chapter XI was given by a number of individuals. Most of this testimony referred to the use of Chapter XI by small businesses, corporate and individual. One of the witnesses who made such statements was Mr. W. Randolph Montgomery, General Counsel for the National Association of Credit Men. On several occasions he referred to its use by small businesses. However, (1) he indicated inferentially that one purpose of the new Chapter XI was to *permit* small corporations to adjust their debts so as to relieve the courts of unnecessary Chapter X (77B) proceedings in a way which was not possible under the previous wording of the old composition section, Section 12; and (2) he specifically referred to the fact that Chapter XI would not only be available to large corporations but in certain circumstances would be the only chapter available to them. His

statements on this latter point were made before the Senate Judiciary Committee during public hearings on the Chandler Bill (Hearings Before Subcommittee of Senate Judiciary Committee on H. R. 8046, 75th Cong. 2d Sess., p. 75), and in view of their importance to the present discussion are quoted at length, as follows:

“* * * There is one other matter I would like to bring to your attention. * * * Chapter XI. That is the substitute for the present composition section and for the provisions of section 74, and it is also drawn so as to embrace the type of corporations which need reorganization, but dealing only with unsecured creditors as distinguished from reorganization of its capital structure. There is a provision in that section which requires that the plan of arrangements be filed with the petition. In section 77B the filing of a plan, with the position (sic) is not required, but under chapter XI it is required.

“It seems to me * * * that it would be most unwise to have that rigidly written into the arrangements section. *There are many large corporations which under this bill would not be permitted to go into a corporate reorganization proceeding under chapter X because they are seeking only to adjust unsecured debts. Many of them are enterprises of considerable magnitude and have very large debts.* The problems that confront those corporations at the time they seek relief in the bankruptcy courts are often of such a nature that it would not be possible with the petition to file a plan of arrangement which would eventually commend itself to the corporation and to its creditors.” (Emphasis added)

It is submitted that the foregoing is clear evidence of the fact that the Congressional committees were advised that Chapter XI would not only be availed of by large corporations but would in fact be the only remedy available if the only relief sought was an adjustment of unsecured indebtedness. It is also believed that a careful

examination of the entire testimony before both the House and Senate committees shows no indication of any intent to exclude large companies from Chapter XI.

Furthermore, one of the leading witnesses on the new reorganization chapter, Chapter X, in a public address made shortly after the adoption of the Chandler Act, stated that in his opinion the line of demarcation between Chapter X and Chapter XI was whether the corporation desired to make a simple adjustment of unsecured debts or to make a thoroughgoing reorganization of its capital structure. (See page 9, footnote 6, *supra*).

The Committee Reports

The question of *limiting* the application of Chapter XI to small closely held corporations is also not referred to in the Committee Reports. The only conceivably pertinent statement in either committee report is that on page 51 of the House Report on H. R. 8046 (H. Rep. No. 1409, 75th Cong., 1st Sess.):

“... The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12.”

The Senate Report (S. Rep. No. 1916, 75th Cong., 3d Sess.) refers to the House Report but does not otherwise contain any statements on this point.

This quotation is revealing in showing (1) that the Committee had in mind primarily the fact of *permitting* small companies to come under Chapter XI and had no specific intention of *excluding* other companies, and (2) that one of the primary reasons for Chapter XI was to relieve the courts of the burden of hearing unnecessary 77B (Chapter X) proceedings. In fact the clear statement

of the intention of Congress is (Sections 130, 146 and 147) that all corporations which can achieve the desired result through the remedy afforded by Chapter XI *must* proceed under Chapter X rather than Chapter X.

It is true that the Committee Reports refer to various investigations and reports of Governmental and Congressional investigators which point out defects in corporate reorganizations under equity receivership proceedings and under 77B proceedings. The Commission seeks to draw from this a rather involved inference that all publicly held corporations are required to institute proceedings under Chapter X even when proposing merely an adjustment (composition) of unsecured debts, and not complete reorganization. The conclusions of those investigators were that Chapter X (Section 77B) should be considered a *privilege* which should be available only if the corporation conform to certain requirements. There was never any indication whatever that corporations proposing a composition, which could always have been effected under Section 12, should no longer be permitted to act under its successor, Chapter XI. This would, of course, tend to increase rather than decrease the number of Chapter X proceedings, and it is clear from the Congressional history that it was one of the primary objects of Congress in enacting the Chandler Act to restrict the number of Chapter X proceedings.

The factual background of the Chandler Act

1. Prior to Section 77B

Prior to the enactment in 1934 of Section 77B of the Bankruptcy Act, a corporation which desired to effect an adjustment of its indebtedness had (without liquidation in straight bankruptcy) two principal choices. If it were insolvent in the bankruptcy sense, it could propose a composition under Section 12 of the Bankruptcy Act. If it were insolvent only in the equity sense, it could, subject

to various technical restrictions, reorganize through an equity receivership (usually instituted in the federal courts) and a sale of assets thereunder, by foreclosure or otherwise. It also had other remedies and reliefs available, e. g., state court equity receivership and state statutory receivership or readjustment proceedings (see, *infra*, p. 26).

The difficulties of proposing a composition in bankruptcy were pointed out in the report of Solicitor General Thacher submitted to Congress in 1932^{10A}, which is the first of the reports of investigators referred to in the Congressional reports on the Chandler Bill. Essentially the chief difficulties were two, first, that a corporation had to be insolvent in the bankruptcy sense and, second, that Section 12 did not authorize the issuance of stock or other securities in connection with the composition.¹¹ Accordingly, the Solicitor General recommended the adoption of an amendment to the Bankruptcy Act so as to permit corporations, whether insolvent in the bankruptcy sense or in the equity sense; to reorganize in a manner so that new securities could be issued. A suggested form of bill was submitted and this bill with amendments was subsequently enacted as Section 77B. The Solicitor General referred to the use of Section 77B by large publicly held corporations. However, he made no recommendation that Section 77B be the only remedy available to such corporations and even after Section 77B was enacted, Section 12 remained in the Act unchanged and available to all debtors, individual and corporate. (All other remedies referred to above also remained available.)

2. Under Section 77B

Many small corporations, apparently in order to avoid the stigma of bankruptcy, proceeded under Section 77B

^{10A} Report to the President on the Bankruptcy Act and Its Administration (S. Doc. No. 65, 72nd Cong., 1st Sess.).

¹¹ These difficulties were also pointed out in the Report of the Counsel to the Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings (See *infra* p. 22).

when the relief sought was merely a composition, such as could have been effected under Section 12. It is a matter of common knowledge that the courts were overburdened with these small proceedings, and the problem was examined, *inter alia*, by the Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings.

Counsel for such Committee prepared a report which was submitted to Congress. (S. Doc. No. 268, 74th Cong., 2d Sess., especially pages 1-17). This report made certain recommendations. To understand them, one must recognize that they were designed primarily to restrict the number of 77B proceedings. Counsel's viewpoint was that Section 77B (Chapter X) was a *privilege*, and that as a privilege its use should be limited. The quotations on pages 29 and 30 of Petitioner's Brief must be read with this in mind.

Furthermore, this report recommends that the primary line of demarcation be based upon a standard of insolvency. If a corporation were insolvent in the bankruptcy sense, it was to be required to act under Section 12. If the corporation were insolvent only in the equity sense, it was to be permitted (have the privilege) to act under Section 77B. The primary insolvency standard was to be qualified by a secondary standard, namely, that if the securities were publicly held the corporation would be permitted to act under Section 77B even though insolvent in the bankruptcy sense. A careful reading of the conclusions of Committee counsel clearly indicates that he did not have in mind *compelling* publicly held corporations to go under Section 77B, but rather that such corporations should have a *privilege* to do so even if insolvent in the bankruptcy sense, while smaller corporations could do this only if merely insolvent in the equity sense. This clearly emphasizes that in his opinion all corporations, whether publicly owned or not, should act under Section 12 if possible.

It should also be noted that Committee counsel in recommending a secondary standard of availability of the

privilege of Section 77B, namely that the corporation be publicly owned, specifically pointed out that any such standard would necessarily require incorporation of a definition of "public" or "publicly owned". There is, of course, no such standard expressed in the Act as adopted, nor does the Act contain any such definition.

The third of the reports recited in the Committee Report on the Chandler Bill as containing evidence upon which the amendments of the bill were proposed is the Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees. Its recommendations and conclusions are contained at pages 897 et seq. of Part I of this Report. The Report is, in general, subject to the same comments as made above, namely, that it nowhere recommends that the scope of Section 77B (Chapter X) be enlarged to include *mandatory* companies proposing compositions which formerly could be effected under Section 12.

It is clear, therefore, that at the time the Chandler Bill was enacted, one of the primary evils to be corrected was the large number of compositions effected in 77B proceedings which should have been effected under Section 12, or could have been if Section 12 were amended so as to provide for issuance of new securities as is the case in Chapter XI (Section 306 (2)).

The structure of the Act

The Act as drawn established a line of demarcation between Chapter X and Chapter XI proceedings which is clear, reasonable and remedies one of the important evils which was under consideration by Congress, namely, to restrict unnecessary Section 77B (Chapter X) proceedings and to differentiate between a *reorganization* and a *composition*.

The line of demarcation, in the express words of the statute, is whether the corporation is^o proposing a simple debt arrangement, viz. an arrangement merely with respect to its unsecured indebtedness, or is proposing a complete reorganization of its capital structure.¹² If a corporation proposes to adjust merely its unsecured indebtedness, it not only is permitted to act under Chapter XI, but *it is required to do so* (Sections 130, 146 and 147). Thus, if a corporation is proposing to affect only its unsecured indebtedness it does not act in good faith if it files under Chapter X (Section 146), and the Court must either dismiss the Chapter X proceeding or permit an amendment of its petition so as to come under Chapter XI (Sections 141, 146, and 147). Further, a petition under Chapter X must state "the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under Chapter XI of this A " " Section 130 (7)).

In this connection it may be noted that, whereas counsel for the Special Senate Investigating Committee referred to above, recommended that the primary line of demarcation between the two chapters be whether the corporation is insolvent in the bankruptcy or equity sense, this standard was clearly not adopted under the Act. As stated above, Congress also did not adopt the secondary criterion recommended by Committee counsel, that is, whether the corporation be publicly owned or not. The fact that this criterion was rejected by Congress is clear and conclusive on the question of Congressional intent.

As a matter of fact, although the Commission argues that Chapter X and Chapter XI are mutually exclusive in that a large publicly held corporation *must* act under Chapter X, it is clear from the structure of the Act that

¹² The Commission states (Petitioner's Brief, page 23) that the decision of the court below imputes to Congress the irrational intention of providing safeguards for mortgage bondholders but not for unsecured creditors. This argument has nothing whatever to do with size or public ownership, since the same argument would apply to a few creditors of a small corporation.

Chapter X must also be used where a corporation, no matter how small, proposes a readjustment which is more than a simple adjustment of its unsecured debt. No matter how small or closely held the corporation is, if it wishes to affect its secured indebtedness or its capital stock under the Bankruptcy Act, it must act under Chapter X.

Furthermore, the Commission's argument as to publicly held debtors is refuted by the provisions of Chapter X itself because if a debtor is below the criterions of size (not public ownership) therein set forth, it is not then subject to or entitled to many of the so-called "protection safeguards" of that Chapter.

Judge Chesnut, in the case of *In re Credit Service, Inc.*, (*supra* page 10) at p. 882 of 30 F. Supp. succinctly discusses the Commission's contention in this respect:

"The concrete contention of the Commission in this case is that Chapter XI is inapplicable where the debtor has outstanding publicly held securities. There is no language that I have been able to find in the chapter which either expressly or by clear implication contains this limitation. It can only be supplied by adding some such wording to the definition of the word 'debtor' or the definition of the word 'arrangement'. These definitions are, however, clearly and all-inclusively worded in the sections from which they are quoted, and they do not contain the important limitation which the Commission proposes to have read into them. In my opinion it is not legally permissible to supply by construction, where the language as used is clear, such an important qualification. There is here no room for construction at all. * * * Furthermore, the language sought to be supplied is itself vague and indefinite in its meaning, as it does not plainly define what shall constitute outstanding publicly held securities either in kind or in amount, or as to the number of holders. It seems to me quite impossible to supply such wording by construction based only on such legislative history as we have in this case."

That Congress specifically intended Chapter XI to be available to publicly held corporations is evidenced by Section 393, which provides for an exemption of securities issued under Chapter XI from the provisions of Section 5 of the Securities Act of 1933. (This section is substantially the same as Section 264 of Chapter X.)

***The argument of "mutual exclusiveness"*¹³**

The Commission argues that Chapters X and XI are mutually exclusive and that a corporation with its securities outstanding in the hands of the public must act under Chapter X. We understand this to be an argument that Chapter X is the only method by which a publicly held corporation can effect any readjustment of debts. However, there are still several alternative methods by which such an adjustment can be made. For example, it is clear that such a corporation can proceed in ordinary bankruptcy, through an equity receivership, through a state receivership, or through special statutory provisions, such as the *in hac verba* provision in Sections 3 and 5 of the Delaware Corporation Law, or the New York State Burchill Act (New York Real Property Law Sections 121-123), where applicable. We are unable to understand how the claim can be made that a publicly held corporation does not have equal rights to proceed under Chapter XI where the language of Congress specifically permits all debtors, corporate and individual, to proceed thereunder. In conclusion, therefore, the history and the framework of the statutes point to one logical conclusion, namely, that Chapters X and XI, as well as ordinary bankruptcy, provide for different methods and types of relief, each one having a

¹³ We do not fully understand the meaning of this term but repeat it because it is used so frequently by the Commission in its brief.

separate history and being individually designed for a different purpose.

***The derivation of Chapter XI from
Sections 12 and 74***

Chapter XI is derived from former Sections 12 and 74 of the Bankruptcy Act. Section 12 authorized compositions by any person which could become a bankrupt. Section 74 applied to all such persons except corporations.

Section 12 did not authorize extensions as such. Section 74 did. However, it has been pointed out that under Section 12 compositions could be and were proposed which were in effect extensions of time.

Section 12 did not authorize the issuance of new securities, e.g. stock, in a composition. Accordingly, it was not adaptable to most types of readjustment required by large publicly held corporations. However, certain types of corporate readjustment could be effected as compositions by large companies. This would be particularly so in the case of a real estate corporation whose business was primarily the holding and operation of real estate investments, and securities of companies operating real estate investments (as in the case of the Debtor). Thus, in one case, a composition by a large corporation (total creditors' claims of more than \$12,000,000) was made in respect of bonded indebtedness which was held by over 3,000 bondholders. *In re Realty Associates Securities Corp.*, 69 F. (2d) 41 (C.C.A. 2d, 1934) cert. den. 292 U. S. 628 (1934).¹⁴ No question was raised as to the validity of the corporation acting under Section 12 although problems arising in this composition were twice before the Circuit Court of Appeals for the Second Circuit and twice before this Court. Furthermore, the composition proposed in that case was strikingly similar in substance to the

¹⁴ The same composition was also considered in 6 F. Supp. 549 which was modified in 74 F. (2d) 61 but confirmed in 295 U. S. 245 (1935).

arrangement proposed in this case. It is submitted that the arrangement proposed by the Debtor in this proceeding could always have been effected under Section 12. There is no evidence of any intention to restrict corporations which could formerly have acted under Section 12 from acting under Chapter XI.

The Commission states (Petitioner's Brief, page 17) that Chapter X is the successor of Section 77B and of equity receivership as the *normal* reorganization procedure for corporations with widely distributed securities; that Chapter XI is the successor to Sections 12 and 74 as the *normal* method of readjustment for small individual and corporate businesses; and infers that the criterion of normality is relevant in determining *restrictive* use of those chapters. It is illogical to argue that normality is a criterion of exclusiveness. For example, (1) Section 12 undoubtedly was normally used by small corporations, but it was occasionally used by large corporations (e.g., see *In re Realty Associates Securities Corporation*); (2) Chapter XI is the normal method for a small corporation to effect a readjustment of its debts, but if a small corporation requires the readjustment of its *secured* debts or stock, it must proceed under Chapter X.

II

THE FAIRNESS, EQUITABILITY AND FEASIBILITY OF THE ARRANGEMENT ORIGINALLY PROPOSED IS NOT PROPERLY IN ISSUE AT THIS TIME INASMUCH AS THE DISTRICT COURT HAS NOT YET CONFIRMED OR REFUSED TO CONFIRM ANY ARRANGEMENT.

The Commission (Petitioner's brief, page 33) and Judge Clark in his dissenting opinion (R. 426) argue that no arrangement can be inaugurated by this Debtor under Chapter XI which can properly satisfy the requirements of the

statute as to fairness and equitability. It seems rash to conclude that no fair, equitable and feasible arrangement in the instant case can be proposed. It is not the function of the courts to decide questions until they arise. No arrangement has as yet been confirmed and the question of whether or not any arrangement, which is fair and equitable and feasible, may or may not be promulgated is not in issue. The arrangement of which the Commission complains is no longer before the District Court, since an amended arrangement, which is not a part of the record, has been proposed. The Commission continually discusses involved statements of figures and facts which relate to the *substance* of the arrangement originally proposed. Such facts, since such arrangement is not before this Court, are entirely superfluous and irrelevant, and the Debtor sees no reason for a lengthy or detailed discussion of them.

As stated by Judge Swan in the majority opinion of the Circuit Court of Appeals in this proceeding (R. 423):

“Whether the proposed arrangement meets the requirements necessary for confirmation (section 366) is a matter unrelated to jurisdiction and one upon which the district court will later have to pass when the issue of confirmation is presented.”

III

NOTWITHSTANDING STATEMENTS OF THE COMMISSION IT IS CLEAR THAT AN ARRANGEMENT CAN BE PROPOSED BY THIS DEBTOR WHICH MEETS THE REQUIREMENTS OF CHAPTER XI.

The Commission argues, relying upon the *Boyd*¹⁵ case and the *Los Angeles*¹⁶ case, that this Debtor can never propose an arrangement under Chapter XI which is “fair

¹⁵ *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482 (1913).

¹⁶ *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939).

and equitable" (Section 366) because the rights of the stockholders of the Debtor are not being changed.

It is submitted that those decisions are not applicable to Chapter XI proceedings.

Furthermore, we will show that this Debtor can propose an arrangement which is "fair and equitable" even within the meaning ascribed to that phrase in the *Boyd* and *Los Angeles* cases.

1. Inapplicability of the Boyd and Los Angeles cases to Chapter XI Proceedings.

Chapter XI (Section 306(1)) defines an arrangement as any plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. The statute further provides (Section 356) that an arrangement must include provisions modifying or altering the rights of unsecured creditors generally, or of some class of them, upon any terms or for any consideration. An arrangement may include (Section 357(1)) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms. Chapter XI does not contain any provision for changing the rights of secured obligations or stock. The very fact that Chapter XI expressly authorizes different treatment of unsecured creditors, which under the doctrine of the *Boyd* and *Los Angeles* cases should all receive equal treatment, and provides for altering and modifying the rights of unsecured creditors without changing the rights of stockholders, seems conclusively to exclude the application of the doctrine of those cases to Chapter XI proceedings. It is to be noted that in the *Los Angeles* case itself reference is made by this Court to the fact that compositions are different from reor-

ganizations (308 U. S. 119, footnote 14). An arrangement is both in fact and by its statutory history a composition.

As for the contention of the Commission that the words "fair and equitable" cannot mean one thing in Chapter X and another thing in Chapter XI, we respectfully point out that this Court has in two of the cases cited by the Commission itself for another point, expressly stated that words or phrases may have different meanings in different parts of the same statute. *American Security Co. v. District of Columbia*, 224 U. S. 491, 494 (1912); *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 128 (1934). There seems no doubt whatever that the *Los Angeles* and *Boyd* cases do not apply to Chapters XII and XIII, which deal with real estate arrangements by individuals, and with arrangements by wage earners, and which also contain exactly the same phrase. The fact that Chapters X and XI deal with inherently different types of readjustment, viz. composition and extension in Chapter XI and complete reorganization in Chapter X, shows conclusively that the phrase also has a different meaning in Chapter XI from its meaning in Chapter X.

2. Contributions by Stockholders.

A fair and equitable arrangement in conformity with the principles of the *Boyd* and *Los Angeles* cases can be proposed. (The amended arrangement, held by the referee to be both fair and equitable, is not a part of the record and therefore cannot properly be discussed.) The doctrines of the *Los Angeles* case and of the *Boyd* case are both the same, namely, that a senior class of securityholders cannot be made to sacrifice part of the value of their security in favor of junior securityholders having no equity, unless the junior securityholders make a contribution in order to maintain their position. The contribution, when the Debtor

is solvent,¹⁷ may be made by giving to the senior securityholders whose rights are being affected, property or additional securities senior to the junior securityholders the terms of whose obligations are not being changed.

The argument of the Commission that no arrangement can be proposed by the Debtor in this proceeding which is fair and equitable is believed to be specious. Chapter XI (Section 363) provides for the proposal of amendments to arrangements. If a proceeding should be dismissed in the event the original arrangement were held unfair or inequitable, the foregoing section of the statute would be indeed a vain thing. The Debtor does not believe it to be possible to determine, until the matter of the confirmation of an arrangement has been acted upon and an order entered thereon by the Court, whether the proceeding should or should not be dismissed for failure to propose a fair and equitable arrangement.

This Court in the *Los Angeles* case (where the debtor was insolvent) specifically recognized that stockholders could retain their interest if they made certain contributions to the reorganization.

The arrangement originally proposed provided for a substantial contribution from the equity interest of stockholders; *inter alia*, as follows:

¹⁷ The Commission in its brief infers and Judge Clark in his dissenting opinion (R. 427) states that the Debtor is insolvent, basing such argument on a theory that the assets of the Debtor "barely exceed \$7,000,000 while its liabilities total \$4,551,416 without including the 'contingent' liability of \$3,800,000 here to be modified." (R. 427) The record clearly demonstrates that the figure of \$7,000,000 does not include the asset represented by the stock and a large unsecured obligation of Trinity Buildings Corporation of New York. (R. 226-325) In the arrangement originally proposed (R. 32) the Debtor states that the fair market value of the mortgaged premises is believed to be well in excess of the mortgage. It is therefore clear from the record itself that the Debtor is not insolvent in the bankruptcy sense. We point out that throughout this Court's opinion in the *Los Angeles* case emphasis is laid on the fact that the debtor in such case was completely insolvent in the bankruptcy sense.

(a) The Debtor's certificate holders would receive a new guarantee, enforceable irrespective of the provisions of the New York State Mortgage Moratorium and Deficiency Judgment Laws, whereas, the present guarantee, which is the subject of modification in this proceeding, would not be enforceable as to principal inasmuch as the value of the mortgaged premises is believed to be in excess of the amount due under the Mortgage (R. 32). (New York Civil Practice Act, Sections 1077-a et seq., 1083-b; *Honeyman v. Hanan*, 275 N. Y. 382, appeal dismissed 302 U. S. 375.)

In addition, the arrangement could be amended so as to provide for additional contributions by the stockholders of the Debtor, as follows:

(b) Certificate holders might receive, in addition to full par for par value in new bonds, a bonus of preferred stock of Trinity (the Debtor's subsidiary) so that the certificate holders would receive the full principal amount of their share certificates, plus a bonus, before the Debtor, or indirectly its stockholders, received anything.

(c) A sum in cash, even though the certificate holders would have no recourse whatever against the Debtor on the guarantee, as to principal, because of the New York moratorium laws referred to above.

IV

THE SECURITIES AND EXCHANGE COMMISSION HAS NO POWER OR AUTHORITY TO INTERVENE IN A PROCEEDING UNDER CHAPTER XI EVEN WITH THE PERMISSION OF THE COURT. THE COMMISSION IS A STATUTORY BODY WITH LIMITED AUTHORITY AND NO STATUTE AUTHORIZES ITS PARTICIPATION IN A CHAPTER XI PROCEEDING. THE COMMISSION'S PARTICIPATION HEREIN IS ULTRA VIRES.

The Commission, a statutory body, has no power to participate in this proceeding. It is an established principle that governmental agencies created by statute have no authority except such as is specifically granted them by statute.

A leading case on the subject is *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643 (1931) in which Mr. Justice Sutherland, speaking for this Court, succinctly stated the established principles as follows (p. 649):

“ * * * Official powers cannot be extended beyond the terms and the necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.”

That case involved a cease and desist order by the Federal Trade Commission and this Court held that the Commission was without jurisdiction to make such order in the absence of the facts required by the statute to give it such jurisdiction.

In *Davis v. Rochester Can Company*, 220 A. D. 487 (1927) (affirmed without discussion as *Mellon v. Rochester Can Company*, 247 N. Y. 521, 1928), it was held that the Interstate Commerce Commission had no jurisdiction to determine disputed claims for money due from a shipper

to a transportation company. The court said at pages 489-490 with respect to the powers of such Commission:

“Extensive as are its powers the same are, nevertheless, limited by the statutes that give it life and being. Within its assigned circle of duty it is practically supreme—beyond that it has no authority or obligation whatsoever, except such as may be necessarily incident to its specific powers. * * *

“It is purely the creation of the Congress of the United States, which may add to or take away from its powers and likewise may abolish it altogether. Upon Congress alone its jurisdiction depends. It cannot be enlarged or diminished except by the will of Congress lawfully expressed. No individual nor corporation can confer upon it official power or take from it that which it has. An examination of the act of 1887 and its various amendments discloses that no authority or jurisdiction to determine disputed claims for money due from a shipper to a transportation company is vested in the Commission either as a court or as an arbitrator. Neither is such a power necessary for the proper conduct of the business therein delegated to it. Those matters are left for the determination of the courts and as to them the Commission does not exist. Both by common law and statute, a natural person may at the request of disputants arbitrate their differences. Such a power cannot, even by consent, be conferred on a corporation, for it has no entity outside its appointed corporate powers and those necessarily incidental thereto. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 636; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43; *People v. Utica Ins. Co.*, 15 Johns. 358, 383; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308.)

“Considering the Commission independently of its corporate attributes and purely as a governmental agency the same rule applies. It needs no citation of authority to uphold the proposition that the power and authority of a public servant are

governed entirely by the statutory limitation of his employment."

Followed in *Pennsylvania R. R. Co. v. Fox & London Inc.*, 93 F. (2d) 669 (C.C.A. 2d 1938).
See also: *Throop on Public Officers* (1892) Section 556..

Nowhere in the statutes creating the Securities and Exchange Commission or granting it additional powers is there to be found any authority, express or implied, for its participation under Chapter XI. Chapter XI makes no reference to the Commission although Chapter X specifically grants a limited authority for participation by the Commission in Chapter X proceedings. The Commission's participation in this proceeding is clearly ultra vires.

The Effect of Rule 24 of the Federal Rules of Civil Procedure

As stated above, unlike Chapter X, Chapter XI gives no express authority to the Commission to act as intervenor. As to intervention under Chapter XI, it was the apparent intent of Congress that all questions of intervention should be determined by the Bankruptcy Act and General Bankruptcy Practice (Section 302). Chapter XI contains no provision at all for intervention.¹⁸

General Order in Bankruptcy 48 provides that the General Orders (except General Orders 18, 28 and 29) shall apply to proceedings under Chapter XI. General Order 37 provides that in proceedings under the Bankruptcy Act, the Rules of Civil Procedure shall, unless in-

¹⁸ There are, of course, provisions in Chapter XI granting all interested parties the right to be heard—Sections 334, 365 and others. It is also to be noted that Section 392 provides that, unless otherwise ordered by the Court, notices are to be given in the manner prescribed by Section 58 of the Bankruptcy Act, and that Section 58 provides only for notice to creditors.

consistent with the Act, be followed as nearly as may be.¹⁹

Therefore, Rule 24 of the Rules of Civil Procedure is applicable to Chapter XI proceedings. Rule 24 provides as follows:

“(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

Rules 24(a)(1) and 24(b)(1) are clearly inapplicable, inasmuch as no statute confers on the Commission either an unconditional or a conditional right to intervene in Chapter XI proceedings.

Rule 24(a)(3) is likewise clearly inapplicable since the Commission is not adversely affected by the disposition or distribution of any property in the custody of the Court.

Therefore, the justification for permitting the Commission to intervene must have its foundation either on

¹⁹ Rule 81 of the Rules of Civil Procedure provides that the rules shall not apply to bankruptcy proceedings except in so far as they may be made applicable by rules promulgated by the United States Supreme Court.

- (1) Rule 24(a)(2), on the theory that the Commission has an interest in the proceeding, and that such interest, if any, is not represented adequately by existing parties, and in addition that the Commission is bound by a judgment in the proceeding; or
- (2) Rule 24(b)(2), on the theory that the Commission has a claim which has a question of law or fact in common with the main proceeding.

It is submitted that as far as intervention of right is concerned under Rule 24(a)(2), the Commission does not have an interest in the proceeding within the meaning of that subdivision of the rule. According to the notes prepared under the direction of the Advisory Committee, Rule 24 is a mere application and restatement of the former practice of the Federal Courts with respect to intervention, both at law and in equity, under which practice only "interested parties" were allowed to intervene. (Moore's Federal Practice, 1938, p. 2325.) The extent of interest required before a court can permit a party to intervene is well expressed in *Smith v. Gale*, 144 U. S. 509, 518-519 (1892), where this Court was discussing the construction of various statutes:

"These provisions of the Dakota code appear to have been originally adopted from Louisiana, wherein it is held * * * that the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. *Gásquet v. Johnson*, 1 La. 425, 431. In *Horn v. Volcano Water Co.*, 13 California, 62, 69, the Supreme Court of California had occasion to construe a similar provision of the code of that State, and held, speaking through Mr. Justice Field, now a member of this court, that 'the interest mentioned in the statute which entitles

a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment * * *. To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, which is the subject of litigation.' * * *

"The intervention must be not only to protect the direct and immediate interest of the intervenor in a suit, but she is bound to make that interest appear by proper allegations in her petition."

See also:

Lombard Investment Company et al. v. Seaboard Manufacturing Company, 74 Fed. 325 (C. Ct. S.D. Ala. 1896);

Glass v. Woodman et al., 223 Fed. 621 (C.C.A. 8th, 1915);

Stewart v. Kansas City, 239 U. S. 14 (1915);

Howe v. Meriwether, 172 Fed. 868 (C.C.A. 8th, 1909);

Rhinehart v. Victor Talking Machine Co., 261 Fed. 646 (D. Ct. N.J. 1917);

Clark v. Young, 31 F. (2d) 227 (C.C.A. 5th, 1929).

No possible construction of Rule 24 (b) (2) can permit any intervention, since it is self-evident that the Commission's "claim or defense and the main action" do not have any "question of law or fact in common."

The Commission in its brief (Petitioner's Brief, page 0) urges that the court below addressed its discussion in the intervention point solely to whether the Commission could intervene as of right and did not discuss the question of whether the Commission could intervene with

permission of the court. However, the point of permissive intervention was fully argued by the Commission in its brief before the Circuit Court of Appeals and presumably was fully considered by that court and determined adversely to the contention of the Commission.

V

THE COMMISSION HAD NO STATUS TO APPEAL FROM THE ORDERS OF THE DISTRICT COURT. THE RIGHT OF APPEAL IS A CREATURE OF STATUTE AND CANNOT BE PROSECUTED WITHOUT STATUTORY AUTHORITY. NEITHER THE BANKRUPTCY ACT NOR ANY OTHER STATUTE GRANTS THE COMMISSION THE RIGHT TO APPEAL IN A CHAPTER XI PROCEEDING.

This question seems now academic, but we submit that it was correctly decided below (R. 424-425).

The right of appeal is purely statutory and is available only to those to whom the privilege is extended. *Credit Alliance Corporation v. Atlantic Pacific & Gulf Ref. Co.*, 75 F. (2d) 595, 596 (C.C.A. 8th, 1935); *In re Maryanov*, 20 F. (2d) 939, 941 (D. Ct. E.D.N.Y. 1927).

The bankruptcy court is a statutory court and possesses only the jurisdiction conferred upon it by statute. *Chicago Bank of Commerce v. Carter*, 61 F. (2d) 986 (C.C.A. 8th, 1932). Under Section 25 of the Bankruptcy Act appeals under the bankruptcy act may be taken only by an "aggrieved party". The Commission is neither aggrieved by the orders of which it complains, nor is it a proper party to the proceeding as shown above in the discussion as to its right to intervene. It therefore has no standing which entitles it to appeal. *Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577 (1931).

Even in Chapter X where the Commission has certain

specific duties, it is specifically denied the right of appeal (Section 208); in Chapter XI the Commission is not even mentioned. Furthermore, since the Commission may not, under Section 208, appeal from an order dismissing a Chapter X petition on the ground that the remedy under Chapter XI is adequate, why should it be permitted to appeal from an original order approving the filing and adequacy of a Chapter XI petition?

CONCLUSION

The judgment appealed from is right, and should be affirmed.

Dated: April 20, 1940.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Respondent.

JOSEPH A. BENNETT,
CHARLES W. DIBBELL,
HENRY M. MARX,
of Counsel.

P 6

SUPREME COURT OF THE UNITED STATES.

No. 796.—OCTOBER TERM, 1939.

Securities and Exchange Commission, Petitioner; <i>vs.</i> United States Realty and Improvement Company.	}	On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Second Circuit.
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[May 27, 1940.]

Mr. Justice STONE delivered the opinion of the Court.

The questions are whether respondent's petition for an arrangement of its unsecured debts under Chapter XI of the Bankruptcy Act should be dismissed because the relief obtainable under that chapter is inadequate, and whether the Securities and Exchange Commission is entitled to raise and litigate that question by intervention and appeal.

Respondent, a New Jersey corporation doing business in New York as owner of and manager of real estate investments, has outstanding 900,000 shares of capital stock without par value, which are listed on the New York Stock Exchange and are stated by respondent to be held by some seven thousand stockholders. It has liabilities of \$5,051,416, of which only \$74,916 is current. This indebtedness includes two series of publicly held debentures aggregating \$2,339,000, maturing January 1, 1944, which are secured by a pledge of corporate stock of little value and a \$3,000,000 note, due August 12, 1939, which is secured by a first mortgage owned by respondent. In addition respondent is also liable as a guarantor of payment, principal and interest, and sinking fund of mortgage certificates in the sum of \$3,710,500, issued by its wholly owned subsidiary Trinity Building Corporation of New York and now in the hands of some nine hundred holders. These certificates have been in default for failure to pay interest, principal and sinking fund since January 1, 1939. They are secured by mortgage of real estate and buildings which are Trinity's only substantial assets. Each year since 1936 respondent has suffered a net loss in the con-

duct of its business and is now unable to pay its debts as they mature.¹

Before maturity of the first mortgage certificates, respondent and the Trinity Company joined in proposing to certificate holders a plan for the modification of the obligation of the certificates, leaving unaffected the other indebtedness and stock of respondent. By this plan the maturity of the certificates was to be extended, the rate of interest reduced, and the terms of the provisions for payment of the sinking fund modified. Respondent's guarantee, as to the extension and interest was to be modified accordingly, and its guarantee of sinking fund payments was to be eliminated. The plan was to be consummated by resort to two proceedings, one to be instituted by respondent under Chapter XI of the Bankruptcy Act, 11 U. S. C. Supp. V, § 701 *et seq.*, 52 Stat. 840, 905, for an "arrangement" modifying its guarantee of the certificates in the manner already indicated. The other was to be instituted on behalf of Trinity in the New York state courts under the Burchill Act, New York Real Property Law, §§ 121-123, to secure the appropriate modification of Trinity's primary obligation on the certificates. The plan provided that the modification of respondent's guarantee by the Chapter XI proceeding should stand, even though the state court should refuse to confirm the proposed modification of Trinity's obligation on the certificates. When the assent to the plan of holders of certificates amounting to approximately 55 per cent. in number and amount, had been obtained, the present proceeding was begun May 31, 1933, by the filing in the district court for Southern New York of a petition praying that the proposed "arrangement" affecting the unsecured indebtedness of respondent be approved.

The district court found that the petition was properly filed under § 22 of Chapter XI of the Bankruptcy Act, and directed that re-

¹ The alleged value of debtor's assets is \$7,076,515. Of this \$5,200,000 is represented by the stock of the subsidiary and a first mortgage on a building owned by the subsidiary which is pledged to secure respondent's \$3,000,000 note. Current assets are less than \$400,000. The balance of the assets, consisting chiefly of mortgages, loans and other securities in the amount of \$555,655, an investment of \$477,300, in securities of an independent company, unimproved real estate valued at \$290,000, and a note receivable from a subsidiary of \$137,500. As against the total nominal value of these assets of \$7,076,515, the debtor's total liabilities, including its liability on the matured debenture certificates, are \$9,261,916.

² The record shows that counsel for one of the committees of bondholders interposed objections to the Chapter XI proceedings and proposed to file an involuntary petition under Chapter X. The district judge expressed the

respondent debtor continue in possession of the property. On July 18, 1939, the district court entered an order permitting the Securities and Exchange Commission to intervene. The motions of the Commission to vacate the order approving the debtor's petition, to dismiss the proceeding under Chapter XI, and to deny confirmation of the proposed arrangement, were denied by the district court and the cause was referred to a referee for further proceedings. On appeal by the Commission from these several orders and on appeal of the respondent from the order of the district court permitting the Commission to intervene, the appeals being consolidated and heard together, the Court of Appeals for the Second Circuit reversed the order permitting the Commission to intervene and dismissed the appeal of the Commission. 108 F. (2d) 794. We granted certiorari April 1, 1940, the questions raised being of public importance in the administration of the Bankruptcy Act.

The Court of Appeals held that the proceeding to secure approval of the arrangement, embodied in the plan proposed by respondent, was properly brought under Chapter XI of the Bankruptcy Act; that the intervention by the Commission was not authorized by any provision of the Bankruptcy Act and that it had no interest affected by the proceeding under that chapter entitling it to intervene under the applicable rules controlling intervention in the federal courts, and that consequently it was not aggrieved by the order appealed from and so was not entitled to maintain its appeal.

The Commission argues that Chapter X of the Bankruptcy Act prescribes the exclusive procedure for reorganization of a large corporation having its securities outstanding in the hands of the public such as respondent,³ and that consequently the district court was without jurisdiction to entertain respondent's petition under Chap-

opinion that a Chapter X proceeding was preferable, but when the debtor agreed to make an immediate interest payment of one and one-half per cent. for the purpose of dissuading the creditors from filing the Chapter X petition, and when the objecting creditors accepted the offer and dropped the involuntary petition, the judge felt compelled to continue the Chapter XI proceeding.

³ By § 126 a corporation or three or more creditors may file a petition under Chapter X.

By § 130 every petition shall state:

"(1) that the corporation is insolvent or unable to pay its debts as they mature;

"(2) the applicable jurisdictional facts requisite under this chapter;

"(7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act; . . ."

ter XI; that in any case the district court should have dismissed the petition because in the circumstances no fair and equitable arrangement affecting respondent's unsecured creditors alone such as is prescribed by Chapter XI, can be consummated in a proceeding under that chapter. Such being the status of the case under Chapter XI, the Commission insists that it was properly allowed to intervene in order to protect the interest of the public specially committed to its guardianship by the provisions of Chapter X, and to forestall the impairment of its own functions under that chapter by an unauthorized or improper resort by respondent to Chapter XI, and that for the same reason the Commission was entitled to appeal from the order of the district court refusing to dismiss the Chapter XI proceedings.

To this it is answered, as the Court of Appeals held, that respondent, although a large corporation with its securities widely distributed in the hands of the public, is nevertheless within the literal terms of Chapter XI, which unqualifiedly authorizes a debtor to petition under that chapter for an arrangement with respect of its unsecured indebtedness, and that the district court was accordingly bound to entertain the petition, however desirable it might be that the reorganization should proceed under Chapter X, whose procedure is better adapted in cases like the present to protect the public interest and to secure a fair and equitable reorganization, than are the provisions of Chapter XI.

Chapter XI provides a summary procedure by which a debtor may secure judicial confirmation of an "arrangement" of his unsecured debts. The debtor who is defined as a "person who could become a bankrupt under section 4 of the Act", § 306(3), may according to sections 4 and 1(23), be any person (which includes corporations), except a municipal, railroad, insurance or banking corporation or a building and loan association. The debtor files his original voluntary petition for an arrangement in such a court as would have jurisdiction of a petition in ordinary bankruptcy¹ and must file with the petition the proposed arrangement. §§ 322, 323. An arrangement is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts upon any terms." § 306(1). The unsecured debtors may be treated generally or in classes. §§ 356, 357.

¹ § 311 confers on the court in which the petition is filed exclusive jurisdiction of the debtor and his property, where not inconsistent with the provisions of the chapter.

It is evident that the language of the sections to which we have referred in terms confers on the court jurisdiction of a petition for an arrangement, which the present petition is, filed by a debtor, which the respondent is, in the technical sense that it confers on the court power to make orders in the cause which are not open to collateral attack. See *Pennsylvania v. Williams*, 294 U. S. 176, 180, *et seq.* But the Commission points out that a proceeding begun under Chapter X may be begun and continued under that chapter only if the petition is filed in good faith, §§ 130 (7), 143, 146 (2), 221, and that under § 146 (2) "a petition shall be deemed not to be filed in good faith if . . . (2) adequate relief would be obtainable by a debtor's petition under the provisions of Chapter XI"; that Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public through the intervention of the Commission, while Chapter XI which is peculiarly adapted to the speedy composition of debts of small individual and corporate businesses, omits the machinery for reorganization set up by Chapter X; and contains no provision for participation by the Commission in a proceeding under Chapter XI. From this it argues that the district court was without jurisdiction to entertain respondent's petition under Chapter XI, and the readjustment of its indebtedness through judicial action can properly proceed only with the safeguards, public and private, afforded by Chapter X.

While we do not doubt that in general, as will presently appear more in detail, the two chapters were specifically devised to afford different procedures, the one adapted to the reorganization of corporations with complicated debt structures and many stockholders, the other to composition of debts of small individual business and corporations with few stockholders, we find in neither chapter any definition or classification which would enable us to say that a corporation is small or large, its security holders few or many, or that its securities are "held by the public", so as to place the corporation exclusively within the jurisdiction of the court under one chapter rather than the other. But granting the jurisdiction of the court, the question remains of the propriety, in the circumstances, of its order retaining jurisdiction, and of the extent of its duty to go for-

6. *Sec. and Ex. Comm. vs. U. S. Realty and Imp'r't. Co.*

ward with the proceeding under Chapter XI in the face of the contention that Chapter X alone affords a remedy adequately protecting the public and private interests involved. The answer turns not on the court's statutory jurisdiction to entertain a proceeding under Chapter XI, but on considerations growing out of the public policy of the Act found both in its legislative history and in an analysis of its terms, and of the authority of the court clothed with equity powers and sitting in bankruptcy to give effect to that policy through its power to withhold relief under Chapter XI when relief is available under Chapter X, which is adequate and more consonant with that policy.

Before the enactment of Section 77B of the Bankruptcy Act, 48 Stat. 941, 912, the bankruptcy mechanism was designed for the final liquidation of the bankrupt's estate, except to the extent only that compromise with creditors was authorized by §§ 12, 74. Bankruptcy afforded no facilities for corporation reorganization which, in consequence, could be effected only through resort to the equity receivership with its customary mortgage foreclosures and its attendant paraphernalia of creditors' and security holders' committees, and of rival reorganization plans. Lack of knowledge and control by the court of the conditions attending formulation of reorganization plans, the inadequate protection of widely scattered security holders, the frequent adoption of plans which favored management at the expense of other interests, and which afforded the corporation only temporary respite from financial collapse, so often characteristic of reorganizations in equity receiverships, led to the enactment of 77B.⁵

The creation of the Securities and Exchange Commission, specially charged by various statutes with the protection of the interests of the investing public,⁶ and observed inadequacies of § 77B,⁷

⁵ See S. Doc. No. 65, 72d Cong., 1st Sess., p. 90; H. Rept. No. 1049, 72d Cong., 1st Sess., p. 2.

⁶ The basic assumption of Chapter X and other acts administered by the Commission is that the investing public dissociated from control or active participation in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems. See, e.g., Securities Act of 1933, 48 Stat. 74, 15 U. S. C. §§ 77a-77aa; Securities and Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. Supp. V. § 79; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U. S. C. Supp. V. §§ 77aaa-77bbb.

⁷ The revision of 77B resulted from the investigation of a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc.

to its revision and enactment in changed form^o as Chapter X, so as to provide for a larger measure of control by the court over security holders' committees and the formulation of reorganization plans and to secure impartial and expert administrative assistance in corporate reorganizations through participation of the Commission. Except where the liabilities are less than \$250,000, Chapter X requires the appointment of a disinterested trustee, §§ 156-158, and a thorough examination and study by the trustee of the debtor's financial problems and management, § 167(3)(5). The trustee is required to report the result of his study, to send the report to all security holders with notice to submit to him proposals for a plan of reorganization, § 167(5)(6). He then formulates a plan or reports the reasons why a plan cannot be formulated, § 169. By § 176 consent to a plan in advance of its initial approval by the judge is void unless procured with his consent. A large measure of control is given to the court over the reorganization and of committees of security holders and their compensation, §§ 163, 165, 209, 212, 241-243.

If the judge finds the plan presented worthy of consideration he may refer it to the Commission for report and must do so where the liabilities of the debtor, as in the present case, exceed \$3,000,000, § 172. When the plan is submitted to creditors after approval by the judge it is accompanied by the report of the Commission and the opinion of the judge approving the plan, § 175. The Commission with the approval of the court is authorized to participate generally in the proceedings as a party, and it is its duty to do so upon request of the court, § 208.

No. 268, 74th Cong., 2d Sess.; and from a study by the Securities and Exchange Commission of the degree of protection afforded to the investing public in reorganizations. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1936-1939). See Hearings before the Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess.; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess.; H. Rept. No. 1499, 75th Cong., 1st Sess.; S. Rept. No. 1916, 75th Cong., 3d Sess. See Dodd, *The Securities and Exchange Commission's Reform Program for Bankruptcy Reorganizations*, 38 Col. L. Rev. 223; Swaine, "Democratization" of Corporate Reorganizations, 38 Col. L. Rev. 256; Houston, *Corporate Reorganizations under the Chandler Act*, 38 Col. L. Rev. 1199; Tetoff, *Reorganization Revised*, 48 Yale L. J. 573; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1; Rostow and Cutler, *Competing Systems of Reorganization, Chapters X and XI of the Bankruptcy Act*, 48 Yale L. J. 1334.

No comparable safeguards are found in Chapter XI.⁸ Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor. The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and disinterestedness, provided in Chapter X. The debtor is generally permitted to stay in possession and operate the business under the supervision of the Court, § 342, and a trustee is provided for only in the case where a trustee in bankruptcy has previously been appointed and is in possession, or if "necessary," a receiver may be appointed. § 332. The debtor proposes the arrangement, §§ 306(1), 323, 357, and the only opportunity afforded the creditors in respect to the proposed plan is to accept or reject it as submitted by the debtor. Acceptances may be solicited either before or after filing the petition and always before approval of the plan by the Court, § 336(4). Section 361 authorizes confirmation of an arrangement when accepted by all the creditors affected by it, "if the court is satisfied that the arrangement and the acceptances are in good faith," and Section 362 permits confirmation if only a majority of the creditors affected accept. The arrangement is to be confirmed if the Court is satisfied that "(1) the provisions of this Chapter have been complied with; (2) it is for the best interest of the creditors; (3) it is fair, equitable and feasible . . . ; and (5) the proposal and its acceptances are in good faith" § 366.

There are no provisions for an independent study of the debtor's affairs by court or trustee, or for advice by them to creditors with respect to their rights or interests in advance of their consent to the arrangement. Committees of the creditors are permitted, §§ 334, 338, but there is no restriction on or supervision over their selection and conduct as in Chapter X. The arrangement may be consummated at the conclusion of a single creditors' meeting. The Court in passing upon the arrangement, is without the benefit of investigation and study by the trustee or Commission, which Congress has

⁸ Chapter XI was sponsored by the National Association of Credit Men and other groups of creditors' representatives expert in bankruptcy. Hearings before the House Committee on the Judiciary on H. R. 6439 (reintroduced and passed in 1938 as H. R. 8046), 75th Cong., 1st Sess., pp. 31, 35. Their business of representing trade creditors in small and middle-sized commercial failures is an important factor in the background of the chapter. See Montgomery, Counsel for the Association of Credit Men, on Arrangements, 13 J. N. A. Ref. Bankruptcy, 17.

required in reorganization proceedings under Chapter X, and is then faced with the fact that a majority of the creditors have already accepted the plan.

Still more important are the differences in the remedies obtainable under the two chapters which result from differences in the nature of the two proceedings and in the securities which may be affected by them. A plan under Chapter X may affect one or more classes of debts or securities of the corporation to be reorganized, and a subsidiary of the debtor may be brought into such a proceeding and reorganized with the debtor. § 129. Under Chapter XI only the rights of unsecured creditors of the debtor may be arranged and this without alteration of the status of any other classes of security holders or of subsidiaries. Both chapters provide for confirmation of the plan or arrangement by the judge "if satisfied that" it "is fair and equitable and feasible" and if "the proposal" of the plan or arrangement "and its acceptance are in good faith", §§ 221, 366. "Fair and equitable", taken from § 77B and made the condition of confirmation under both Chapter X or Chapter XI are "words of art" having a well understood meaning in reorganizations in equitable receiverships and under § 77B which is incorporated in the structure of both Chapters X and XI. See *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 115, *et seq.* The phrase signifies that the plan or arrangement must conform to the rule of *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, which established the principle which we recently applied in the *Los Angeles* case, that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible.

Since the sections under Chapter XI already considered admit of an "arrangement" only with respect to unsecured creditors without alteration of the relations of any other class of security holders, and since it contemplates, as required by § 366, that the arrangement shall be fair and equitable within the meaning of the *Boyd* case, it is evident that Chapter XI gives no appropriate scope for an arrangement of an unsecured indebtedness held by some nine hundred individual creditors of a corporation having seven thousand

stockholders. The hope of securing an arrangement which is fair and equitable and in the best interests of unsecured creditors, without some readjustment of the rights of stockholders such as may be had under Chapter X, but is precluded by Chapter XI, is at best but negligible and, if accomplished at all, must be without the aids to the protection of creditors and the public interest which are provided by Chapter X, and which would seem to be indispensable to a just determination whether the plan is fair and equitable.

Respondent suggests that the proposed arrangement may be taken to satisfy the test of the *Boyd* case since under it the certificate holders would receive a new guarantee, enforceable as to principal notwithstanding the New York moratorium law, in place of the old guarantee to which that law applies. See *Honeyman v. Hanen*, 275 N. Y. 382, appeal dismissed 302 U. S. 375. It also insists that it is not impossible that an arrangement of its unsecured indebtedness under Chapter XI may be proposed which would meet the test. It states that, availing itself of the privilege afforded by § 263, it has proposed an amended arrangement which is not in the record and the terms of which are not disclosed. But it suggests that the arrangement could be amended so as to provide for a ratable distribution to certificate holders of preferred stock of Trinity, respondents subsidiary, held by respondent or for a similar distribution of cash. But such suggestions raise the question whether the supposed advantage to the creditors is a fair and adequate substitute for the elimination of stockholders within the requirements of the *Boyd* case—a question which obviously cannot be answered with any assurance in the present case without resort to the facilities for investigation of the financial condition and structure of the debtor and its subsidiary, and to the expert aid and advice of the Commission available under Chapter X.

Confirmation of an arrangement follows a finding of the court that it is for the best interests of the creditors, § 366(2). Here determination of what is in the "best interest of the creditors" depends on the answer to the question whether the stockholders should be eliminated or, the creditors should receive some substitute compensation, and whether that compensation is fair and equitable. In a situation like the present it is in the best interests of the creditors that these questions should be answered in a Chapter X proceeding.

While this means that arrangements of unsecured debts of cor-

porations, like respondent, may not, be "in the best interests of creditors" and "feasible" under Chapter XI, it does not mean that there is no scope for application of that chapter in many cases where the debtor's financial business and corporate structure differ from respondent's. This is especially the case with small individual or corporate business where there are no public or private interests involved requiring protection by the procedure and remedies afforded by Chapter X. In cases where subordinate creditors or the stockholders are the managers of its business, the preservation of going-concern value through their continued management of the business may compensate for reduction of the claims of the prior creditors without alteration of the management's interests, which would otherwise be required by the *Boyd* case. See *Case v. Los Angeles Lumber Products Co.*, *supra*, 121, 122.

Under § 146(2) a petition may not be filed under Chapter X unless the judge is satisfied that "adequate relief" would not be obtainable under Chapter XI. Obviously the adequacy of the relief under Chapter XI must be appraised in comparison with that to be had under Chapter X, and in the light of its effect on all the public and private interests concerned including those of the debtor. Applying this test, if respondent had proceeded under Chapter X, the judge would have been compelled upon inquiry to approve its petition on the ground that it complied with the requirements of Chapter X, and that adequate relief could not be obtained under Chapter XI. That being the case the question here is whether, in the absence of any provision of Chapter XI specifically authorizing the dismissal of the petition, the district court should on that ground have dismissed the proceeding under Chapter XI, leaving respondent free to proceed under Chapter X which affords every remedy which could be obtained under Chapter XI and more.

A bankruptcy court is a court of equity, § 2, 11 U. S. C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. *Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 535; *Continental Illinois Nat. Bank & T. Co. v. C. R. I. & Pacific Ry.*, 294 U. S. 648, 675; *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131; *Pepper v. Litton*, 308 U. S. 295. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public in-

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terest. It may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer. *Pennsylvania v. Williams*, *supra*, 185 and cases cited; *Virginia Railway v. Federation*, 300 U. S. 515, 549, *et seq.* Before the provisions for alternative remedies were brought into the Bankruptcy Act by Chapters X and XI the occasion was rare when a court could have felt free to deny a petition in order to serve some public or collateral interest at the expense of the petitioner's right to an adjudication. But here respondent, if dismissed, need not go without remedy. All that it can secure rightly or equitably in a Chapter XI proceeding is to be had in a Chapter X proceeding. The case stated most favorably to respondent is that it has proposed an arrangement which appears on its face not to be "fair and equitable" and hence not to be entitled to confirmation under Chapter XI. Respondent's circumstances, as disclosed by its petition and proposed arrangement, are such as to raise a serious question whether any fair and equitable arrangement in the best interest of creditors can be effected without some re-arrangement of its capital structure. In any case that and subsidiary questions cannot be answered in the best interest of creditors without recourse to the procedure of a Chapter X proceeding. Pending the litigation respondent seeks to stay the hand of its creditors and in the meantime to avoid that inquiry into its financial condition and practices and its business prospects, provided for by Chapter X without which there is at least danger that any adjustment of its indebtedness will not be just and equitable, and that its revived financial life will be too short to serve any public or private interest other than that of respondent.

In this situation, we think the court was as free to determine whether the relief afforded by Chapter XI was adequate as it would have been if respondent had filed its petition under Chapter X. What the court can decide under § 146 of Chapter X as to the adequacy of the relief afforded by Chapter XI, it can decide in the exercise of its equity powers under Chapter XI for the purpose of safeguarding the public and private interests involved and protecting its own jurisdiction from misuse. Here, we think it was plainly the duty of the district court in the exercise of a sound discretion to have dismissed the petition remitting respondent if it was

so advised to the initiation of a proceeding under Chapter X, in which it may secure a reorganization which, after study and investigation appropriate to its corporate business structure and ownership, is found to be fair, equitable and feasible, and in the best interest of creditors. While a bankruptcy court cannot, because of its own notions of equitable principles, refuse to award the relief which Congress has accorded the bankrupt, the real question is, what is the relief which Congress has accorded the bankrupt and is it more likely to be secured in a Chapter X or Chapter XI proceeding? In answering it we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be "fair and equitable and feasible". Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part.

If respondent had sought relief by way of an equity receivership such would have been the duty of the Court. *Pennsylvania v. Williams, supra*. We think it is no less so here. Before the enactment of Chapters X and XI, the district court in a 77B proceeding was "not bound to clog its docket with visionary or impracticable schemes of resuscitation", however honest the efforts of the debtor and however sincere its motives, and it was its duty to dismiss the proceeding whenever it appeared that a fair and equitable plan was not feasible, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22. And it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition to move for the vacation of an adjudication or the dismissal of a petition on grounds, whether strictly jurisdictional or not,⁹ that the proceeding ought not to be allowed to proceed.

The Court of Appeals thought that the Commission had no such special interest as to entitle it to intervene as of right in the Chapter XI proceeding and concluded that the district court erred in

⁹ *Royal Indemnity Co. v. American Bond & Mortgage Co.*, 61 F. (2d) 875, aff'd 289 U. S. 165; *In re Ettinger*, 76 F. (2d) 741; *Chicago Bank of Commerce v. Carter*, 61 F. (2d) 986; *Vassar Foundry Co. v. Whiting Corp.*, 2 F. (2d) 240. *In re Nash*, 249 Fed. 375.

permitting the intervention and that from this it followed that the Commission had no right to appeal. Its decision is in effect that a governmental agency not asserting the right to possession or control of specific property involved in a litigation may not be permitted to intervene without statutory authority. Neither Chapter X nor Chapter XI, in terms, gives a right of "intervention", but the Commission is authorized, with the permission of the court, to appear in any Chapter X proceedings, § 208. Such right as the Commission may have to intervene in a Chapter XI proceeding is, therefore, governed by the Rules of Civil Procedure and the general principles governing intervention. We are not here concerned with the refinements of the distinction between intervention, as a matter of right, which the Court of Appeals thought was restricted to cases where the intervenor has a direct pecuniary interest in the litigation, and permissive intervention, a distinction which has been preserved by Rule 24 of the Rules of Civil Procedure. For here the question is not of the Commission's intervention "as of right", but whether the district court abused its discretion in permitting it to intervene.

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent. Sen. Rep. No. 1916, 75th Cong., 3d Sess., p. 31.

Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by paragraph 37 of the General Orders for bankruptcy, authorizes "permissive intervention". It directs that upon timely application any one may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interests in the subject of the litigation. Cf *Pennsylvania v. Williams*, *supra*. If, as we have said, it was the duty of the court to dismiss the Chapter XI proceeding because its maintenance there would defeat the public interest in having any scheme of reorganization of respondent subjected to the scrutiny of the Commission, we think it plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it. *The Exchange*, 7 Cranch. 16; *Stanley v. Schwalby*, 147 U. S. 508; *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14; *Pennsylvania v. Williams*, *supra*; See, *Hopkins Saving Ass'n v. Barry*, 296 U. S. 315. Cf *In re Debs*, 158 U. S. 564; *New York v. New Jersey*, 256 U. S. 296, 307, 308.

This interest of the Commission does not differ from that of a liquidator under a state statutory proceeding who may, in a proper case, intervene in an equity receivership in a federal court to ask the court to relinquish its jurisdiction in favor of the state proceeding. *Pennsylvania v. Williams*, *supra*. Neither the liquidator nor the state has any personal, financial or pecuniary interest in the property in the custody of the federal court. Their only interest, like that of the Commission, is a public one, to maintain the state authority and to secure a liquidation in conformity to state policy. The "claim or defense" of the Commission founded upon this interest has a question of law in common with the main proceeding in the course of which any party or a creditor could challenge the propriety of the court's proceeding under Chapter XI.¹⁰ The claim or defense is

¹⁰ See Note 8 *supra*.

thus within the requirement of Rule 24 and intervention was properly allowed. The Commission was, therefore, a party aggrieved by the court's order refusing to dismiss and was entitled to appeal under §§ 24 and 25 of the Bankruptcy Act. See *Interstate Commerce Commission v. Oregon-Washington R. Co.*, *supra*; *Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104.

Section 208, applicable to proceedings under Chapter X, gives the Commission, upon filing its notice of appearance, "the right to be heard on all matters arising in such proceeding", but provides that it "may not appeal or file any petition for appeal in any such proceeding." As § 208 has no application to a proceeding under Chapter XI, it is unnecessary to consider the suggestion of the Commission that the limitation of the section is upon appeals to review questions arising in the proceeding from the performance by the Commission of its advisory functions and does not preclude it from appealing to challenge the exercise or non-exercise by the district court of its jurisdiction under Chapter X.

Reversed.

Mr. Justice DOUGLAS did not participate in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U.S.

SUPREME COURT OF THE UNITED STATES.

No. 796,—OCTOBER TERM, 1939.

Securities and Exchange Commission,

Petitioner,

vs.

United States Realty and Improve-
ment Company.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Second Circuit.

[May 27, 1940.]

Mr. Justice ROBERTS.

The Chandler Act¹ revised the Bankruptcy Act of 1898, as amended, and, in chapters X, XI, XII, XIII, and XIV, provided for corporate reorganizations, arrangements, real property arrangements, wage earners' plans, and Maritime Commission liens. These, with chapter VIII, authorizing agricultural compositions, chapter IX, dealing with indebtedness of local taxing agencies, chapter XV, added by Act of July 28, 1939, 53 Stat. 1434, and § 77, relating to reorganization of interstate railroads, in addition to the seven chapters of the original Act, constitute a comprehensive system for accommodating or liquidating indebtedness in the interest of both debtors and creditors. In chapters X to XIII, inclusive, added by the Chandler Act, the first section states: "The provisions of this chapter shall apply exclusively to proceedings under this chapter," thus evidencing the purpose to make each type of proceeding complete and exclusive of the others.

The proceeding instituted by the respondent, as is conceded, falls precisely within the terms of chapter XI, which deals with arrangements, and confers jurisdiction on the District Court to entertain the cause. But it is said that for the court to exercise that jurisdiction would be so contrary to the unexpressed purpose of Congress that the court should have refused to act. The decision assumes that if Congress had been interrogated as to its intent it would have expressed its will that an arrangement by one having

¹ Act of June 22, 1938, 52 Stat. 840.

such a financial structure as the respondent should not be permitted, and that, in order to prevent such a result, Congress, if it had been prescient, would have so stated. This seems to me to go beyond the construction of the Act as it is written and to amount to an amendment of it. I think that this is not admissible on the ground advanced that to hold otherwise would be to nullify rather than to effectuate the intent of Congress which is thought to pervade the statutory scheme.

Where the words are as plain and unambiguous as they are in chapter XI recourse cannot be had to legislative history or other extraneous aids to construe them in some other sense, to add to, or to subtract from, what is written.²

But if resort to conventional aids to construction were admissible, they seem to me to confirm the statutory right of the respondent to proceed under chapter XI and to preclude a holding that it should have proceeded under chapter X.

Under § 12 of the Bankruptcy Act of 1898 a corporation could propose a composition but, as recourse to bankruptcy, whether for the purpose of liquidation or of proposing a composition, was dependent upon insolvency as defined in the statute rather than mere inability to pay debts as they accrued, a company finding itself in the latter condition could not avail itself of the bankruptcy jurisdiction but had to resort to an equity receivership.

In 1932 the Solicitor General, in a report to the President on the Bankruptcy Act and its administration,³ pointed out the difficulties of proposing a composition in bankruptcy and suggested relief of the sort which was ultimately accorded by the adoption of § 77B.

By an Act of March 3, 1933,⁴ there was added to the Act a provision which permitted "any person excepting a corporation" by petition, or by answer in an involuntary proceeding, to assert his insolvency or his inability to meet his debts as they accrued and his desire to effect a composition or an extension of time to pay his

² *Thompson v. United States*, 246 U. S. 557, 551; *Iselin v. United States*, 270 U. S. 245, 250; *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 277; *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89; *Wallace v. Cullen*, 297 U. S. 229, 237; *Osaka Shosen Line v. United States*, 300 U. S. 98, 101; *Palmer v. Massachusetts*, 308 U. S. 79, 83.

³ Sen. Doc. 65, 72d Cong., 1st Sess.

⁴ 47 Stat. 1467, § 74.

debts; and to adjust his indebtedness in that way. Thus an arrangement procedure was provided for individuals who were not insolvent in the bankruptcy sense. The same legislation also provided for agricultural compositions and extensions and for reorganizations of interstate railroads, but Congress did not, at that time, afford any further relief to corporations generally.

By the Act of June 7, 1934,⁵ § 77B was added, permitting the reorganization of a corporation unable to meet its debts as they mature.

When, by the Chandler Act, Congress determined to revise and codify the entire bankruptcy system, it repealed § 12 and § 74, and, in lieu of them, adopted chapter XI, permitting arrangements of unsecured debts by individuals, partnerships, and corporations.⁶ It thus clearly drew a distinction between a reorganization which affects various classes of creditors and stockholders and an arrangement which is merely an extension, adjustment, or accommodation of unsecured claims without disturbing either secured claims or stock interests. Where this simple form of accommodation would suffice, it was not intended that the corporation should have the privilege of a reorganization under chapter X, the successor of § 77B, for it is provided in chapter X (§ 146) that a petition shall not be deemed to be filed in good faith if adequate relief would be obtainable by a debtor's petition under the provisions of chapter XI and further (§ 147) that a petition filed under chapter X improperly because adequate relief can be obtained under chapter XI may be amended to comply with chapter XI and may be proceeded with as if originally filed under the latter. No such provision is found in chapter XI with respect to a case properly falling under chapter X. Obviously the right to proceed under chapter X was deemed a privilege of which a corporation could not avail itself if it could proceed under chapter XI.

The gravamen of petitioner's argument is that Congress intended the more detailed and cumbersome procedure of chapter X to apply wherever securities of the corporation were held by the public whereas chapter XI was intended to apply only in the case of individuals or corporations not having such securities outstanding.

The Act will be searched in vain for any hint of such a distinction. Small corporations are permitted to avail themselves of

⁵ 48 Stat. 911.

⁶ 11 U. S. C. §§ 706, 707.

chapter X if stockholders' or secured creditors' rights are to be affected; large corporations, under the very letter of chapter XI, may avail themselves of its provisions if all they desire to do is to extend or accommodate their unsecured indebtedness. The smallest corporation cannot come in under chapter XI if it desires what has been traditionally known as a reorganization. The largest corporation may proceed under chapter XI if it does not desire a reorganization.

The argument of the Commission comes merely to this: That foresight and providence on the part of Congress would have dictated a different line of demarcation between the two chapters and that what Congress should have said in chapter XI was that any debtor which did not have securities outstanding in the hands of the public might file a petition under chapter XI but that all others must file under chapter X.

The legislative history furnishes but the scantiest support for the argument. Indeed it bears quite as strongly against the Commission's contention as in its favor. The only item to which counsel is able to point is a committee report to the House⁷ wherein it is said:

"Section 12 has been recast; such features of section 74 are incorporated as are deemed of value and the combined sections are made Chapter XI of the Act under the title 'Arrangement'. The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under Section 74 but do not require the complex machinery of that section, to resort to the simpler and less expensive though fully adequate relief afforded by Section 12."

It is undoubtedly true that many more small corporations will find chapter XI available than large ones but this does not at all support the Commission's claim that the chapter was not intended to be available to companies having securities in the hands of the public.

On the other hand, testimony before the Congressional Committee was to the effect that large corporations would not come under chapter X if they were seeking merely to adjust their unsecured debts and should go, therefore, under chapter XI.⁸

⁷ H. Rep. 1409, 75th Cong., 1st Sess., pp. 50-51.

⁸ Hearings, Subcommittee Senate Judiciary Committee on H. R. 8016, 75th Cong., 2d Sess., p. 75.

One of the draftsmen of the Chandler Act, in a public exposition,⁹ has said:

"What is the line of demarcation between proceedings under Chapter X and Chapter XI? Without attempting to go into detail, Chapter XI proceedings are intended for the reorganization of corporations with simple debt structures—reorganizations under which the interests of stockholders and secured creditors are not to be modified or readjusted. If secured claims or stock interests are to be changed without the consent of all of the stockholders and secured creditors, proceedings must be instituted under Chapter X."

That chapters X and XI were not written in ignorance of the distinction between corporations having publicly owned securities and those which have not, is shown by the fact that a special committee's report called attention to this difference and suggested that corporations not having such securities outstanding be permitted to go under the arrangements chapter whereas the first named should be required to file under what is now chapter X.¹⁰ With this suggestion before it Congress adopted a different criterion.

When all is considered it is evident that little support for the Commission's argument can be gained from the legislative history. It is of no avail to urge that it would have been far better for Congress to adopt a different scheme and that the public interest which Congress had in mind in writing chapter X extends quite as much to a composition such as that proposed in the instant case as to the reorganizations envisaged in chapter X. These considerations may well be urged upon Congress in support of an amendment of the statute but they can have no weight with a court called upon to apply its plain language.

Equally unavailing is the argument that the present case must belong under chapter X since secured creditors and stockholders must be brought into the reckoning and because one of the requirements of § 366 is that the court must find the arrangement is "fair and equitable and feasible". It is said that this phrase is a term of art, given meaning by our decision in *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482, and that, within that meaning, no fair, equitable, and feasible plan can here be accomplished under chapter XI although it could be under chapter X.¹¹

⁹ Journal of the National Association of Referees in Bankruptcy (Jan. 1939), p. 72.

¹⁰ Sen. Doc. 268, 74th Cong., 2d Sess., pp. 9-15.

The short answer is that the phrase is used not only in chapter XI and chapter X but also in chapter XII respecting real property arrangements, and in chapter XIII respecting wage earners' plans.¹¹ Obviously the phrase as used in the Chandler Act must be given the connotation appropriate to the section in which it is used.

Another argument put forward is that, as courts of bankruptcy are courts of equity, they may, as a chancellor might in the case of a bill for receivership, find that the balance of convenience requires a refusal to exercise a jurisdiction possessed. I think this is a complete misapplication of the principle that a court of bankruptcy is a court of equity. That has been many times stated but never in connection with the right of a debtor to invoke the remedy provided by Congress in the bankruptcy laws. The legislature has specified who is entitled to the relief provided by the statute and in what circumstances. The court has no power to refuse that relief on the ground that some other relief would better serve the purpose. What is meant by the statement that a court of bankruptcy is a court of equity is that its function is to make an equitable distribution of the estate among the creditors, but the principle has not been applied in the sense that the court may, in its better judgment, refuse to award the relief which Congress has accorded the bankrupt.

No stockholder or creditor, secured or unsecured, has attempted to raise the question of the District Court's jurisdiction under chapter XI. The Securities and Exchange Commission, although charged with no duty by the Act in connection with proceedings under chapter XI, has sought to intervene and to appeal from a decision by the District Court adverse to the Commission's views. Although the Commission may be permitted to appear in chapter X proceedings, it is expressly provided that it may not appeal from any decision.¹² No analogous provision is found in chapter XI although that chapter does, in certain instances, grant interested parties the right to be heard.¹³

By general order the Rules of Civil Procedure are made applicable in bankruptcy so far as practicable. It is suggested that Rule 24 authorizes the Commission's intervention but a mere reading of

¹¹ See §§ 472 and 656, 11 U. S. C. §§ 872, 1056.

¹² § 208, 11 U. S. C. § 608.

¹³ §§ 334 and 365, 11 U. S. C. §§ 734 and 765.

the rule shows that neither intervention of right, nor permissive intervention, is available to the Commission in this case. The Commission may not intervene as of right under the rule because no statute confers on it an unconditional right to intervene; the Commission has no interest which may be bound by a judgment in the action; and it cannot be adversely affected by the court's decision. It is not entitled to permissive intervention because no statute confers a conditional right to intervene and because it has no claim or defense which will be affected by any decision of law or fact by the court. The cases in which bankruptcy courts have allowed creditors to raise questions of venue or of jurisdiction to adjudicate under the terms of the statute, where the proceeding would affect the creditors' financial interest, are inapposite, as are also equity receivership cases where an official intervenes in order to claim the right, as such official, to take over and administer the property in the possession of the court.

I am of the opinion that the judgment should be affirmed.

The CHIEF Justice and Mr. Justice McREYNOLDS agree with this opinion.